86-1260

No. 86-____

Supreme Court, U.S.
FILED
JAN 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Petitioner,

—v.—

BALTIMORE ORIOLES, INC., ET AL.,

Respondents.

STEPHEN D. ROGERS, ET AL.,

Petitioners,

—v.—

BOWIE K. KUHN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Of Counsel:

DONALD M. FEHR
Major League Baseball Players Association
805 Fifth Avenue
New York, New York 10022

ANDREW L. FREY
KENNETH S. GELLER
STEPHEN M. SHAPIRO
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JAMES W. QUINN
Counsel of Record

R. BRUCE RICH
ROBIN E. SILVERMAN
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for Petitioners

115 pp

QUESTION PRESENTED

Whether the Copyright Act of 1976 preempts professional baseball players' state law rights of publicity in their names, likenesses and game performances merely because they are embodied in copyrighted telecasts.

PARTIES TO THE PROCEEDING

Petitioners are the Major League Baseball Players Association,* Stephen D. Rogers, Steven Renko, Jr., and Robert R. Boone.

Respondents are The Commissioner of Major League Baseball, The National League of Professional Baseball Clubs, The American League of Professional Baseball Clubs, Atlanta National League Baseball Club, Inc., Chicago National League Ball Club, Inc., The Cincinnati Reds, Doubleday Sports, Inc., Houston Sports Association, Inc., Los Angeles Dodgers, Inc., Lurie Sports, Inc., Montreal Baseball Partnership Reg'd., The Phillies, Pittsburgh Athletic Company, Inc., St. Louis National Baseball Club, Inc., San Diego National Baseball Club, Inc., Baltimore Orioles, Inc., The Boston Red Sox Baseball Club, Chicago White Sox, Ltd., Cleveland Indians Company, John E. Fetzer, Inc., Golden West Baseball Co., Kansas City Royals Baseball Corp., Milwaukee Brewers Baseball Club, Minnesota Twins, Inc., New York Yankees, The Oakland Athletics Baseball Company, Seattle Mariners, The Texas Rangers, Inc., Toronto Blue Jays Baseball Club, and Major League Baseball Promotion Corporation.

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* Pursuant to Rule 28.1 of the Rules of the Supreme Court, the following information is intended to identify petitioner. The Major League Baseball Players Association is a labor organization and an unincorporated association consisting of the Major League Baseball Players.

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BOWIE K. KUHN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on October 29, 1986.

OPINIONS BELOW

The opinion of the court of appeals is reported at 805 F.2d 663 (7th Cir. 1986), and is set forth in Appendix ("App.") A hereto at la-33a.[1] The opinion of the district court is reported at 1985 Copyright L. Dec. (CCH) ¶ 25,882 and is set forth in Appendix B hereto, App. at 34a-49a.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1986 and is set forth in Appendix D hereto, App. at 54a-55a. This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301 of the Copyright Act of 1976 ("the Copyright Act," "the 1976 Act," or "the Act"), 17 U.S.C. § 301, provides in relevant part:[2]

> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

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1 References to the Appendix to this Petition are cited herein as "App. at ____a."

2 Various other provisions of the Copyright Act relevant to the analysis under Section 301, as well as the complete text of Section 301 itself, are set forth in Appendix E hereto, App. at 56a-62a.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

New York Civil Rights Law § 51 (McKinney 1976 & Supp. 1987) provides in relevant part:[3]

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.

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3 Section 51 of the New York Civil Rights Law is illustrative of a number of state statutes incorporating rights of publicity that are directly relevant to the analysis under Section 301 of the Copyright Act. The other statutes are set forth in Appendix F hereto, App. at 63a-80a.

STATEMENT OF THE CASE

This case presents an important legal issue—the extent to which the Copyright Act of 1976 preempts existing state law rights of publicity—in the context of a dispute between professional baseball players (the "Players") and the Major League Baseball Owners (the "Owners" or the "Clubs"). Specifically, the controversy involves the extent to which the Owners, whose conduct would not have been shielded by federal copyright law prior to the effective date of the 1976 Copyright Act, became legally free by virtue of that legislation to exploit the names, likenesses and performances of the Players on the medium of television. As the court of appeals recognized, App. at 2a, this litigation culminates a 40-year disagreement between the parties, in which the Owners have argued that the Players have no rightful claim to any portion of the revenues derived from television, and in which the Players have steadfastly maintained that the Owners have no right to televise the games without the Players' consent. The ramifications of this dispute extend far beyond the baseball industry, since its outcome will directly affect the rights of all professional athletes, as well as other types of professional entertainers.[4]

1. The Background of the Litigation. Long before the commencement of this lawsuit, it had been firmly established that professional athletes, no differently from other entertainers, own publicity rights under state law that permit them to control the commercial exploitation of their names, likenesses and performances. *See, e.g., Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-76 (1977); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 148-49 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982); *Haelan Laboratories* v. *Topps Chewing Gum*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). While the history and essential nature of the

4 In this respect, the Players' claims are no different from those that could be asserted by, *e.g.*, an actor whose live stage performance is televised without his consent.

employment relationship between baseball players and the Owners has led the Players to assert no right of publicity claim with respect to their performances before live audiences, the situation is very different with respect to the exploitation of their likenesses and performances on all modes of television. As to television, the Players contend that these rights have in no way been superseded or expressly or impliedly granted to the Owners solely by virtue of the employment relationship. Indeed, from the very inception of network televising of baseball games, the Players have gone on record as reserving these publicity rights in order to assure both that they would be fairly compensated for them and that their contractual dealings with the Owners would not compromise those rights.

The Owners, while historically disagreeing that the Players own such publicity rights in their television performances, have nevertheless agreed for more than 35 years to share television proceeds with the Players, and to preserve in the Players' contracts the Players' reservations of claims to such rights and the right of either side to present the issue to a court of law for resolution if it ever became necessary.

The Players' tenacity in claiming and reserving their publicity rights enabled them, for a number of years, to be compensated for their televised performances through negotiations with the Owners. In recent negotiations, however, it became apparent that the Owners would no longer assure the Players of an equitable future share in the growing television revenues. While the Players at all times stood ready to reach a negotiated solution, the Owners broke off negotiations and instead commenced litigation seeking to have the Players' rights declared invalid. The Players' countersuit soon followed.

2. The District Court Proceedings. This case originated as two actions for declaratory judgment filed in 1982. *Baltimore Orioles, Inc., et al.* v. *Major League Baseball Players Association*, No. 82 C 3710 (N.D. Ill.); *Stephen D. Rogers, et al.* v. *Bowie K. Kuhn, et al.*, No. 82 C 6377 (S.D.N.Y.). By stipulation, the

cases were consolidated in the United States District Court for the Northern District of Illinois on October 27, 1982.[5]

The Players alleged that state common law and statutory rights of publicity in their names, likenesses and performances made it unlawful to televise Major League Baseball games without the Players' consent. The Owners sought to establish the non-existence of these publicity rights on two separate theories. First, the Owners contended that they possessed a federal copyright in the television broadcasts that preempted any state law rights the Players may have had prior to enactment of the 1976 Copyright Act; this contention rested on the argument that the Players' state law claims were the "equivalent" of copyright claims, within the meaning of Section 301(a) of the 1976 Act, 17 U.S.C. § 301(a). Second, the Owners contended that under principles of master-servant law they, as the Players' employers, owned all rights in and to the performance of Major League Baseball games, including rights to the television broadcasts. App. at 35a-36a.

After extensive discovery involving dozens of depositions and thousands of documents, the Owners moved for summary judgment on their federal copyright and master-servant theories. The Players cross-moved for dismissal of the Owners' copyright claim as a matter of law; the Players also opposed summary judgment on the master-servant theory on the ground that discovery had disclosed sharp factual disputes concerning the nature of the historic employment relationship between the parties that precluded the granting of such relief. App. at 35a-36a. It is a trial on these issues, which necessarily involve the interpretation of the parties' collective bargaining contracts, that the Players continue to seek today.

The district court granted summary judgment for the Owners. On the copyright claim, it held that, by virtue of the copyright it

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5 The plaintiffs in both actions invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1338, 2201 and 2202, and principles of pendent jurisdiction. In addition, the Owners invoked jurisdiction under 29 U.S.C. § 158.

found the Owners to possess in the telecasts of Major League Baseball games, the Owners automatically obtained the right to exploit the likenesses and performances of the Players embodied in such telecasts. To reach this result, the court agreed with the Owners' novel argument that the Players' live performances, when televised and simultaneously videotaped, were in and of themselves separate, copyrightable "works" within the meaning of the Copyright Act, 17 U.S.C. § 101 *et seq.*, which in turn become "works made for hire" controlled by the Owners under Sections 101 and 201(b) of the Act by virtue of the Players' employment by the Owners. App. at 38a-39a. From its conclusion that the Players' performances fell within the Copyright Act's work-for-hire doctrine, the district court further concluded that the Players' rights of publicity were "equivalent" to rights protected by the Copyright Act and hence were preempted by Section 301(a) of the Act. App. at 39a.

The district court likewise granted summary judgment to the Owners on their master-servant claims. The court based its holding on the Players' presumed employment for purposes of rendering televised performances and upon the legal conclusion that master-servant doctrine precludes the assertion of right of publicity claims by an employee unless the employer either has expressly recognized his employee's publicity rights or has agreed to permit his employee to expressly reserve them. App. at 46a-49a.[6]

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6 In ruling for the Owners on their summary judgment motion, the district court assumed away the critical fact issue that it elsewhere conceded was in "sharp dispute." App. at 40a. Beginning with the fact that the Players are employed by the Owners to play baseball, and asserting the proposition that the Owners "retain all rights to their employees' work product," App. at 49a, the district court unjustifiably found that such "work product" comprehended presentation of the Players' performances to audiences "either live or remote." App. at 43a. This was the very issue that has been in dispute for nearly 40 years between the Players and the Owners—whether, in fact, the terms of their employment relationship abrogated the Players' publicity rights in connection with televising the games.

3. The Court of Appeals Proceedings. On appeal,[7] the Seventh Circuit focused almost entirely on the Owners' copyright claims. The court analyzed at length the subsidiary issue of whether the Clubs own copyrights in Major League Baseball game telecasts, and concluded that they do. App. at 17a.[8] It next proceeded to the crux of the issue: whether such copyrights in the game *telecasts* preempt the Players' exercise of rights of publicity in their game *performances*. On the basis of its analysis of the statutory requirements for preemption set forth in Section 301(a) of the Copyright Act, the court of appeals found that the Players' state law claims were preempted. App. at 18a-28a.

With respect to Section 301's requirement that preemption depends upon the existence of equivalence between a state-created right and rights exercisable under the Copyright Act, the court of appeals held that there is equivalence between the Players' rights of publicity in their game performances and the copyright rights that could be asserted in the telecasts of those performances. App. at 23a-28a. Additionally, with respect to Section 301's further requirement that the "work" in which the

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7 Appeal was taken from the judgment of the district court, as amended, set forth in Appendix C hereto, App. at 50a-53a, pursuant to 28 U.S.C. § 1291.

8 The court of appeals repeatedly and incorrectly alluded to the Players' supposed assertion of copyright rights in the game telecasts. *See, e.g.*, App. at 12a, 14a, 17a, 19a. No such claim has ever been made by the Players. Rather, the Players seek only to control, under state right-of-publicity laws, the exploitation on television of their names, likenesses and game performances. This right to control their game performances is to be sharply distinguished from whatever copyright claims the Owners may make in the telecasts themselves. As is discussed below, any such copyrights comprehend merely the creative work involved in making the telecasts, but do not affect any rights embodied in the underlying performances.

As to the issue of ownership of the copyrights in the telecasts, the Players have maintained that whether the Owners (as opposed to some other third party, such as a television network) own such copyrights is not free from doubt. However, the Players have further maintained, for reasons made clear in this petition, that the resolution of that issue has no bearing on the proper disposition of the preemption issue posed by this case.

common law protection inheres (*i.e.*, the Players' performances) be a copyrightable "work of authorship," the court of appeals acknowledged that the Players' game performances were not themselves copyrightable works of authorship. App. at 20a. Nonetheless, it concluded, in the alternative: (1) that once "reduced to tangible form," App. at 21a, on videotape, the performances were transformed into copyrightable works; and (2) that, in any event, state-created rights in the performances were preempted by virtue of the copyrightability of the telecasts embodying those performances. App. at 22a. The result of either branch of this reasoning was that "there is no distinction between the performance and the recording of the performance for the purpose of preemption under § 301(a)." App. at 21a.

With respect to the Owners' master-servant claim, the court of appeals could not ascertain on the basis of the record the state or states whose law would govern. App. at 28a-33a. It therefore vacated the district court's judgment with regard to the master-servant claim and remanded the matter to the district court for a determination of the choice-of-law rule, under Illinois conflicts law, and for factual findings necessary to identify the governing law. App. at 32a.[9]

REASONS FOR GRANTING THE PETITION

This Court on several occasions has addressed the important relationship between federal copyright policies and the co-existing protection of intellectual property afforded by state law. *See, e.g., Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974); *Goldstein* v. *California*, 412 U.S. 546 (1973); *International News Service* v. *Associated Press*, 248 U.S. 215 (1918). Section 301 of

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9 While the Players agree with the court of appeals that there is no adequate basis for upholding the district court's ruling on the state law master-servant issue, the remand of that issue to the district court is puzzling. As is discussed *infra* pp. 15-16, the Seventh Circuit's ruling on the Owners' copyright claim purports to dispose of the subject matter of this suit: the issue of whether the Players possess state law rights to their televised likenesses and game performances.

the Copyright Act of 1976, enacted in the aftermath of these decisions, was intended to clarify and define the federal-state relationship insofar as copyright rights are concerned.

This "revolutionary provision," A. Latman, *The Copyright Law* 33 (1979), termed "the most fundamental change in the copyright system 'since its inception,' " Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 Cornell L. Rev. 673, 701 (1981), was designed to accomplish two principal objectives: first, to provide a single, coherent set of federal rules governing "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright," 17 U.S.C. § 301(a); and second, at the same time to preserve "any rights or remedies under the common law or statutes of any State with respect to . . . subject matter that does not come within the subject matter of copyright," 17 U.S.C. § 301(b). In enacting these sweeping new provisions, Congress thereby sought "to foreclose any conceivable misinterpretation of its unqualified intention," H.R. Rep. No. 1476, 94th Cong., 2d Sess. 1, 130 (1976), with respect to preemption of common law copyright, to preserve state common law and statutory remedies that do not sound in copyright, and "to avoid the development of any vague borderline areas between State and Federal protection." *Id.*

Despite Congress' efforts, Section 301 has instead engendered much litigation and substantial confusion concerning its reach. The decision of the Seventh Circuit significantly adds to this confusion by adopting an exceedingly broad and plainly erroneous approach to the concepts of "equivalent rights" and "works of authorship" within the meaning of Section 301(a), thereby greatly expanding the preemptive effect of that provision. The upshot of the court of appeals' reasoning is that the Copyright Act, rather than serving merely to consolidate in federal law a body of similar and overlapping rights equivalent to the bundle of rights encompassed by a federal copyright, operates to destroy a large body of preexisting state property rights having legal significance independent of copyright.

This development, which is contrary both to Congress' express intent and to principles of federalism, plainly warrants this Court's review. "[T]here is no more significant (and probably no more troublesome) question underlying the [Copyright] Act than the preemptive effect of [Section 301]." A. Latman, *supra*, at 64. Major areas of commerce, including not only Major League Baseball but also other sports and entertainment industries, stand to be affected by the continued state of confusion surrounding interpretation of this provision. Even more fundamentally, the Seventh Circuit's interpretation of the preemptive scope of Section 301 jeopardizes the ability of the 50 states to protect, through long-recognized and as yet developing areas of tort law, the property rights of their citizens.

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT ISSUE CONCERNING THE PROPER RELATION OF FEDERAL COPYRIGHT LAW TO STATE-CREATED PROPERTY INTERESTS.

Section 301(a) of the Copyright Act of 1976, described as "one of the bedrock provisions of the [copyright revision] bill," H.R. Rep. No. 1476, *supra*, at 129, was designed to replace the preexisting "anachronistic, uncertain, impractical, and highly complicated dual system" of copyright protection, *id.*, with a single, uniform federal system for protecting works of authorship. To accomplish that result, Congress provided that, upon the effective date of the Act,

> all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a).

Congress' unmistakable purpose in adopting Section 301, therefore, was to preempt state copyright protection or "equivalent" laws that might interfere with the new Act by providing a parallel, duplicating, but potentially inconsistent regime of regulation for what are essentially the same rights. It is equally indisputable from the plain language of Section 301, however, that Congress also was determined to preserve the power of individual states to regulate in areas outside of the subject matter of the federal copyright scheme. Section 301(b) of the Act explicitly provides that nothing in the Act "annuls or limits any rights or remedies under the common law or statutes of any State with respect to" matter or activities that do not come within the scope of copyright protection, including "works of authorship not fixed in any tangible medium of expression," 17 U.S.C. § 301(b)(1), or "activities violating legal or equitable rights that are not equivalent to any of the exclusive rights" within the scope of copyright. 17 U.S.C. § 301(b)(3).

The legislative history of the 1976 Act confirms Congress' intention not to interfere with traditional state sovereignty in protecting property not amounting to "works of authorship" or rights not sounding in copyright. The House Report, for example, noted with specific reference to publicity rights such as those at issue here:

> The evolving *common law rights of* "privacy," "*publicity*," and trade secrets . . . would *remain unaffected* [by the preemption provision of § 301] as long as the causes of action contain elements, such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement.

H.R. Rep. No. 1476, *supra*, at 132 (emphasis added).

Notwithstanding these objectives, Congress' goal of eliminating ambiguities in Section 301's application to state property interests has not been achieved. Numerous scholarly works have debated the preemptive reach of Section 301, suggesting a variety of analytical frameworks and outcomes with respect to

various state property interests.[10] Likewise, numerous judicial decisions exemplify the existing confusion over the appropriate analysis to be used and outcomes to be reached when assessing claims of preemption under Section 301.[11] Against the backdrop

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10 As to the appropriate mode of analysis, *see, e.g.*, Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. Rev. 1107, 1113 (1977) (Section 301 cuts too narrowly if it was intended to preempt state doctrines whose *purposes* are equivalent to that of copyright and cuts too broadly if it was intended to preempt state doctrines whose *effects* are equivalent to copyright); Abrams, *Copyright, Misappropriation and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 Sup. Ct. Rev. 509, 555 (1983) ("The preemption issue is whether the rights are equivalent, not whether they have similar or different elements of proof.").

As to the survival of various state law rights, *see, e.g.*, M. Nimmer, *Nimmer on Copyright* § 1.01[B] (1986) (causes of action such as unjust enrichment and misappropriation should be preempted by Section 301, whereas causes of action such as infringement of publicity rights should not be preempted); A. Latman, *supra*, at 67-69 (concurring with Nimmer as to publicity rights); Shipley, *supra*, at 719-23 (certain types of publicity actions should remain viable in the face of Section 301, while others should be preempted).

11 As to the appropriate mode of analysis, some courts have focused almost exclusively on one part of Section 301's test: whether the works sought to be protected under state laws fall within one of the general subject matter categories of works protected under the 1976 Act. *See, e.g.*, *Financial Information, Inc.* v. *Moody's Investors Service, Inc.*, No. 86-7598, slip op. at 784 (2d Cir. Dec. 22, 1986) (copying of daily bond cards); *Durham Industries, Inc.* v. *Tomy Corp.*, 630 F.2d 905, 919 n.15 (2d Cir. 1980) (copying of toys). Another approach has been to look at the "equivalence" between the elements of the cause of action comprising the state law claim and the elements comprising a copyright claim. *See, e.g.*, *John H. Harland Co.* v. *Clarke Checks, Inc.*, 1978-81 Copyright L. Dec. (CCH) ¶ 25,265, at 16,496 (N.D. Ga. 1980), *aff'd in part, vacated and remanded in part*, 711 F.2d 966 (11th Cir. 1983) (claims under Georgia's Deceptive Trade Practices Act and for unfair competition not preempted because they "require proof of elements not required in a copyright infringement action and involve more than the mere acts of copying and selling an article"). Yet another approach has been to look at both factors. *See, e.g.*, *Donald Frederick Evans and Associates, Inc.* v. *Continental Homes, Inc.*, 785 F.2d 897, 914 (11th Cir. 1986) (Florida common law tort of unfair competition not preempted by Section 301 because it requires the establishment of "elements other than those mandated in an action under the Copyright Act" and because the claim does not fall within the subject matter of the federal statute).

(footnote continued on following page)

of these diverse interpretations, the Seventh Circuit has now construed the provision in a fashion that radically expands its preemptive effect and threatens the vitality not only of the still-developing common law right of publicity, but by implication other state law rights as well.

In similar circumstances, this Court has intervened to clarify the critically important relationship between potentially conflicting federal and state interests in the regulation of intellectual property. In *Goldstein* v. *California*, 412 U.S. 546 (1973), for example, this Court granted certiorari to consider whether the constitutional authorization of federal legislation governing copyrights automatically foreclosed, under the Supremacy Clause, state regulation of copyright interests. *Id.* at 556-57. In *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974), this Court examined the parameters of the federal patent laws in relation to state protection of trade secrets. In both cases the Court recognized that the states retain an important role in the overall scheme for regulating various forms of intellectual property. This recognition, the Court noted in *Kewanee*, is "premised on the great diversity of interests in our Nation—the essentially non-uniform character of the appreciation of intellectual achievements in the various States." *Id.* at 479.

Still another approach has been to develop an independent framework for analyzing the preemption issue. *See, e.g., M. Bryce & Associates* v. *Gladstone*, 107 Wis. 2d 241, 266-67, 319 N.W.2d 907, 919 (Wis. Ct. App.), *cert. denied*, 459 U.S. 944 (1982) ("[s]ince no 'unmistakable' indication has been given to the contrary by Congress and the weight of the evidence points to the recognition by Congress and other authorities of the value of state protection of trade secrets, we conclude that state trade secret protection has not been preempted by the federal copyright laws").

As to the survival of various state law rights, in addition to the differing outcomes as to rights of publicity here presented, *compare Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 723 F.2d 195, 201 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985) (state law claim of tortious interference with contractual relations is preempted by the 1976 Act) *and Kamakazi Music Corp.* v. *Robbins Music Corp.*, 522 F. Supp. 125, 137 (S.D.N.Y. 1981), *aff'd*, 684 F.2d 228 (2d Cir. 1982) (tortious interference with contractual relations preempted by the Act) *with Fox* v. *Wiener Laces, Inc.*, 74 A.D.2d 549, 425 N.Y.S.2d 114 (App. Div. 1980) (breach of contract or quasi-contract claims remain actionable).

More recently, in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Court was called upon to determine whether, on the facts presented, the right of publicity protected by Ohio law was rendered inapplicable by First Amendment considerations. The Court weighed the competing constitutional and state interests at stake and concluded that the publicity interest was not overcome by a constitutional privilege:

> The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner . . . .

Id. at 575.

Here, too, the preemptive scope of Section 301 is a matter of substantial practical importance requiring clarification by this Court. The court of appeals' opinion, holding that state law publicity rights are "equivalent" to rights granted by the Copyright Act and are thus eliminated by federal law, reflects the current confusion in applying Section 301 to particular state law doctrines. This sweeping ruling affects state law property interests of diverse groups of people, including athletes and entertainers,[12] and threatens important values of federalism. Moreover, as we now show, the decision below is plainly wrong and leads to absurd results.

II. THE COURT OF APPEALS' DECISION REFLECTS FUNDAMENTAL ERRORS IN CONSTRUING THE COPYRIGHT ACT.

In order to appreciate the fundamental errors made by the court of appeals, it is important to understand what is at issue in this case. This controversy involves the validity of the Players' long-standing claim that their right to control publicity regarding their person and activities, granted by state statutory and

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12 *See* Rudell, *Players' Right Of Publicity on TV Pre-Empted by Copyright*, N.Y.L.J., Jan. 23, 1987, at 1, col. 1.

common law, extends to the telecasting of their game performances. This state law right, unless relinquished as part of the employment relationship, would make it tortious for the Owners to televise the games without first securing the Players' consent.

The Owners deny the existence of any such right in the Players, relying on two distinct arguments. The first, which has been available to the Owners since the beginning of regular televising of Major League Baseball games some 40 years ago, is that the nature and history of the master-servant relationship between Players and Owners confers upon the latter the right to control these performances, whether rendered before stadium attendees or viewed by remote television audiences. The correctness of the Owners' master-servant position has yet to be decided because the court of appeals instead resolved the Players' claims on the basis of the Owners' second argument—that the Owners' right to copyright *telecasts* of the game performances extinguishes any state law publicity rights the Players might otherwise have had in those performances. Should the Seventh Circuit's ruling stand, the Players will be deprived of their day in court on the fundamental and long-standing issue of whether the history of the Players' dealings with the Owners has somehow stripped the Players of their state-created property rights despite the parties' carefully drawn collective agreements to the contrary.

The court of appeals' holding that the Players' state law rights have been preempted by the Owners' copyrights in game telecasts is an illogical and wholly unwarranted extension of the monopoly conferred by Congress upon copyright holders. The ruling of the Seventh Circuit stands alone in its determination that publicity rights are subject to preemption by Section 301. This untoward result was possible only because the court's analysis contained two significant errors: the ruling that state law publicity rights are "equivalent" to copyrights within the meaning of Section 301, and the ruling that the embodiment of the game performances themselves on videotape satisfies Section 301's "works of authorship" requirement. It is to these issues that we now turn.

A. The Right Of Publicity Is Not Equivalent To The Protections Afforded By A Copyright.

Section 301(a) of the Copyright Act provides that state law rights, if embodied in "works of authorship," *see infra* Point II.B, are preempted if the rights are "equivalent to any of the exclusive rights within the general scope of copyright . . . ." 17 U.S.C. § 301(a). If the state law rights are not "equivalent," Section 301(b) establishes that they are not annulled or limited by federal law. Central to the operation of Section 301, then, is a determination of the degree of identity between the respective rights under state law and federal copyright law that must exist in order to give rise to preemption.

The court of appeals found preemption on the basis of vague notions of similarity that give an exceptionally and unjustifiably long preemptive reach to Section 301 and that embody basic misconceptions about the respective rights involved. In essence, the Seventh Circuit was satisfied that preemption existed simply because both rights are concerned with commercial exploitation of human activity. In fact, however, the cause of action for copyright infringement and that for invasion of publicity rights contain different substantive elements and seek to protect different property interests; they therefore cannot be considered "equivalent" in any meaningful sense of the term.

The right of publicity has developed at common law and through state statutory enactment as an offshoot of "right of privacy" tort law.[13] The right reflects the desire to protect individuals in exploiting those personal qualities and activities that have earned them good will. Because "[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay," *Zacchini* v. *Scripps-Howard Broadcasting Co.*,

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13 As Dean Prosser has noted of the appropriation branch of privacy law, which is the antecedent of the modern right of publicity: "The first form of invasion of privacy to be recognized by the courts consists of the appropriation, for the defendant's benefit or advantages, of the plaintiff's name or likeness." W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* 851 (5th ed. 1984).

433 U.S. 562, 576 (1977) (quoting Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 Law & Contemp. Probs. 326, 331 (1966)), the right prevents the "appropriation of the very activity by which the [individual] acquired his reputation . . . ." *Zacchini*, 433 U.S. at 576.

Copyright, by contrast, concerns itself with something quite distinct from this right to control the exploitation of the individual's popularity, personality and activities for commercial gain. At bottom, copyright guards against the copying of creative works of authorship—*e.g.*, books, musical compositions, films—that have been fixed in tangible form. But what is capable of being copied is not an evanescent performance but a specific work—not the power, speed, and grace of an athlete but a film or written account creatively portraying those attributes. Indeed, as we discuss in the next section, copyright protection goes not to an event comprising the individual talents of different performers, but to the creative skills involved in capturing and presenting the event, such as choice of camera angles, use of close-ups or full-field perspectives, handling of sound, etc. *See* M. Nimmer, *supra*, § 1.08[C][2] at 1-51. Judge Mansfield accurately described these differences in explaining why publicity rights are not equivalent to copyrights and therefore are not preempted by the Copyright Act:

> Copyright merely protects the holder from the taking of specific expressions or arrangements he or she had created. The right of publicity, on the other hand, protects against the unauthorized appropriation of the individual's very persona which would result in unearned commercial gain to another.

Factors Etc., Inc. v. *Pro Arts, Inc.*, 652 F.2d 278, 289 (2d Cir. 1981) (dissenting opinion), *cert. denied*, 456 U.S. 927 (1982).[14]

These points are so well-settled that there was unanimity of judicial opinion, prior to the instant case, rejecting contentions

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14 The majority did not reach the preemption issue in *Factors* because it ruled that the asserted publicity right did not survive the death of the publicized individual—there, Elvis Presley. *See* 652 F.2d at 283 n.8.

that Section 301 preempted state law publicity rights. In *Factors*, for instance, Judge Mansfield would have affirmed a ruling of the district court to that effect, which correctly observed that the right of publicity "would be severely undermined if it could be so easily circumvented by using a photograph or representation allegedly copyrighted or within the public domain." 496 F. Supp. 1090, 1100 (S.D.N.Y. 1980). *Accord*, *Bi-Rite Enterprises, Inc.* v. *Button Master*, 555 F. Supp. 1188, 1201 (S.D.N.Y. 1983); *Apigram Publishing Co.* v. *Factors Etc., Inc.*, No. C 78-525, slip op. at 2-3 (N.D. Ohio July 30, 1980); *Lugosi* v. *Universal Pictures*, 25 Cal. 3d 813, 850, 603 P.2d 425, 448, 160 Cal. Rptr. 323, 346 (1979) (dissenting opinion) (issue not reached by majority).

The analysis employed by these courts turns on the fact that the causes of action for copyright infringement and for violation of publicity rights contain different substantive elements. Other courts have employed a similar analysis in related contexts to determine whether Section 301 preempts state law rights. One court has described the "prevailing" rule as the "extra element" test, under which there is no preemption if the state right contains an additional element beyond the elements of a copyright infringement claim, provided the extra element is "qualitatively different." *Mayer* v. *Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985) (conversion and misappropriation claims preempted insofar as their causes of action did not contain qualitatively different elements from a cause of action for copyright infringement). *See also Brignoli* v. *Balch Hardy and Scheinman, Inc.*, 645 F. Supp. 1201, 1205-06 (S.D.N.Y. 1986) (claim of unauthorized use of copyrightable material is preempted by Section 301 of the Copyright Act, but claims alleging breach of contract, fraudulent misrepresentation, trade secrets and breach of confidentiality, as well as "palming off," contain additional elements and therefore are not preempted).

In the instant case, by contrast, the court of appeals ignored this analytical mode and did not even examine the elements of the state law right of publicity it so cavalierly destroyed in its

opinion.[15] Instead, it remanded to the district court to identify the law that establishes the contours of the right held to be unenforceable. As the foregoing discussion demonstrates, however, a finding of equivalency, essential to preemption, depends upon identification of the attributes of the preempted right and comparison of those attributes to the rights that are the subject of federal copyright law. By finding equivalency here merely because both rights involve commercial exploitation of human endeavors, the court below gave an unacceptably wide sweep to Section 301 preemption.

B. The Players' Likenesses And Performances Do Not Constitute Copyrightable "Works Of Authorship."

In construing Section 301, the court of appeals did not merely short circuit the proper mode of analyzing the concept of "equivalence" under the 1976 Act. It essentially read out of Section 301 the second crucial requirement for preemption: that the state rights implicated subsist in "works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright," 17 U.S.C. § 301(a). For Section 301 to preempt the Players' rights of publicity, the Players' likenesses and game performances—the "works" embodying the state law right of publicity—would have to constitute copyrightable "works of authorship" under federal law.

The Seventh Circuit committed numerous analytical errors in its effort to satisfy this requirement. It first concluded that, whether or not constituting copyrightable works of authorship in the abstract, the game performances *are* in fact copyrightable works once "reduced to tangible form," *i.e.*, when fixed in the game telecasts. App. at 21a. This conclusion is squarely contrary to the plain language of the Copyright Act and all existing interpretations of that language.

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15 In fact, the specific elements comprising a cause of action for infringement of publicity rights vary with the statutes and common law of the different states. *See infra* Appendix F; Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 Yale L.J. 1577, 1589-91 (1979), and cases cited therein.

Section 102(a) of the 1976 Act sets forth comprehensive categories of "works of authorship" entitled to federal copyright protection.[16] These categories reflect the congressional intention to afford protection to individual efforts demonstrating "creative intellectual or aesthetic labor," and then only if such efforts are in tangible form. *Goldstein* v. *California*, 412 U.S. at 561; M. Nimmer, *supra*, § 1.08[C] at 1-48 to -49. The likenesses and game performances of baseball players, highly skilled though the latter may be, obviously do not satisfy these requirements. They are simply not "creative," "intellectual," or "aesthetic" within the meaning of the Act. Professor Nimmer has so recognized:

> Apart from whether or not the publicity right is "equivalent," it would seem that preemption is conclusively foreclosed by the failure of the "work" to fall within the subject matter of copyright. The "work" which is the subject of the right of publicity is the name and likeness of a celebrity. This can hardly be said to constitute a "writing" of an "author" within the meaning of the Copyright Clause of the Constitution. A fortiori it is not a "work of authorship" under the Act.

M. Nimmer, *supra*, § 1.10[B][1] at 1-14.3 n.49 (citations omitted).

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16 Section 102(a) provides:

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works; and
> (7) sound recordings.

17 U.S.C. § 102(a).

The conclusion that a likeness or performance cannot constitute a work of authorship is not altered merely by fixing such likeness or performance in tangible form. As Section 102(a) of the 1976 Act makes clear, it is only "works of authorship" when "fixed in any tangible medium of expression" that qualify for copyright protection. The Seventh Circuit committed a fundamental error in concluding to the contrary.

Perhaps unsure of its legal footing, the court of appeals further held that the Players lost any rights they may have had in their performances once such performances were embodied in a different work of authorship, *e.g.*, a videotaped telecast. App. at 20a-22a. But once again, the court misperceived basic copyright concepts. As Professor Nimmer has pointed out, a performer's "name and likeness does not become a work of authorship simply because it is embodied in a copyrightable work such as a photograph." M. Nimmer, *supra*, § 1.10[B][1] at 1-14.3 n.49. Indeed, Professor Nimmer has drawn the very distinction that controls here—between non-copyrightable "evanescent performances" and their copyrightable tangible expression in a recording—in the precise context of a sporting contest:

> [I]f a work which itself is not a writing (e.g., an athletic event, a parade, etc.) is broadcast or otherwise disseminated in a written form (e.g., motion picture film) then such writing itself may claim copyright protection. *The copyright in such case lies in the manner of photographing or otherwise recording the event, although not in the event itself.*

Id. § 1.08[C][2] at 1-51 (emphasis added).[17] In other words, the mere embodiment of the Players' likenesses and performances in a physical object that is entitled to copyright protection

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17 This Court long ago recognized the distinction between copyrightable expression and a non-copyrightable likeness or performance. *See Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903).

simply cannot render the Players' state law rights in those likenesses and performances subject to preemption.

This distinction makes perfect sense because the copyrightable elements of game telecasts are confined to the manner in which the games (and the performances taking place therein) may be telecast and recorded, *i.e.*, the camera angles and shot selection involved in producing the broadcasts of the games. In such circumstances, the requisite "intellectual labor may be found in the production aspects of the broadcast . . . and the selection of lighting and angle." Comment, *Copyright Protection for Live Sports Broadcasts: New Statutory Weapons with Constitutional Problems*, 31 Fed. Comm. L.J. 277, 285 (1979). The copyrightability of such telecasts derives not from the evanescent performances of the Players, but from the creative input of those who capture and reduce to tangible, reproducible form, the non-copyrightable event. And that copyright, as Professor Nimmer has explained, extends only to the manner of recording the event, *not* to the event itself. M. Nimmer, *supra*, § 1.08[C] at 1-51. Rights in the underlying event remain protected by traditional state law doctrines—contract, right of privacy, publicity, etc.

The court of appeals' contrary reasoning, which collapses the two concepts, produces absurd results. The state law right to control publicity relating to an individual's personality and activities, found here to be preempted by the copyrightable telecasts, involves the right to prohibit or be compensated for the making of the telecasts in the first place. This much is clear from the court's concession that a telecast that is *not* also fixed in tangible form remains subject to player control under state law publicity rights. App. at 20a-21a. But if the telecast may not lawfully be made without the Players' consent, then it is hard to see how the Owners, by tortiously telecasting the games, nonetheless can somehow extinguish the Players' rights under the aegis of federal copyright law. The court of appeals has put the federal copyright cart before the state law horse that allows the Players control over their publicity rights.

The decision below thus empowers anyone who is able to make a copyrightable version of an athletic or entertainment event to defeat the publicity rights of the participants and producers of the event, even though the filming or videotaping of the event is unauthorized. Under the Seventh Circuit's circular analysis, athletes' and other performers' publicity (and other state law) rights are subject to extinction if their activities are captured in a photograph or videotape or otherwise embodied in a work of authorship (even an unauthorized one).

The court of appeals took pains to deny that its decision would have this extraordinary and untenable result by offering a hypothetical using the facts of *Zacchini*.[18] The court asserted that an unauthorized broadcast of Zacchini's act would not preempt Zacchini's state law publicity rights because it could not as a matter of copyright law be "fixed" except "under the authority of the author." But this conclusion involves an obvious and fatal flaw: Zacchini was not the "author" of the copyrightable work in the court of appeals' hypothetical. As the court elsewhere recognized, it is the makers of the videotape (cameramen, directors, etc.) who provide the creative input constituting authorship. App. at 8a, 22a. Thus, the videotaping of Zacchini's act was just as much "authorized" as the telecasting of a Major League Baseball game would be without the Players' consent. Put another way, the court of appeals seems to have forgotten that the Owners are not authorized to telecast the games by the copyright laws themselves; accordingly, if state law gives the Players the right of publicity (*i.e.*, the right

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18 The court stated:

> [I]f a television station were to broadcast [Zacchini's] act, he could still sue successfully for violation of his right of publicity in his performance. Merely that the television station might videotape its telecast would not grant the station a copyright in the broadcast of Zacchini's performance or preempt Zacchini's right of publicity. To be "fixed" in tangible form, a work must be recorded "by or under the authority of the author," here Zacchini. Because Zacchini did not consent to the telecast, the broadcast could not be "fixed" for the purpose of copyrightability and Zacchini's right of publicity would not be subject to preemption.

App. at 21a n.22 (citation omitted).

to authorize or refuse to authorize the televising), then the Owners stand on precisely the same footing as did the telecaster of Zacchini's act, and by the court's own reasoning they acquired no right to "fix" the broadcast and no copyright preemption of the Players' antecedent state law claims.

In sum, through its misunderstanding of the copyright laws, the court below has effectively licensed a major expansion of the grant to a copyright holder, to encompass commercial control over the *non-copyrightable* elements he captures in his work. Such an outcome is fundamentally inconsistent with the basic premise underlying the entire copyright scheme—that an author can control only what he has created. *See, e.g.*, 17 U.S.C. § 103(b). This expansion of copyright theory threatens the delicate balance between federal and state roles struck by Congress in regulating the important area of intellectual property.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

DONALD M. FEHR
Major League Baseball Players Association
805 Third Avenue
New York, New York 10022

ANDREW L. FREY
KENNETH S. GELLER
STEPHEN M. SHAPIRO
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JAMES W. QUINN
Counsel of Record

R. BRUCE RICH
ROBIN E. SILVERMAN
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for Petitioners

JANUARY 1987

APPENDICES

APPENDIX A

Opinion of the Court of Appeals

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 85-2020

BALTIMORE ORIOLES, INC., et al.,

Plaintiffs-Appellees,

—v.—

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, a labor organization and an unincorporated association consisting of the Major League Baseball Players,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 3710—Charles P. Kocoras, *Judge.*

ARGUED JANUARY 22, 1986—DECIDED OCTOBER 29, 1986

Before COFFEY and FLAUM, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge*. The primary issue involved in this appeal is whether major league baseball clubs own exclusive rights to the televised performances of major league baseball players during major league baseball games. For the reasons stated below, we will affirm in part, vacate in part, and remand for further proceedings.

I

This appeal arises out of a long-standing dispute between the Major League Baseball Clubs ("Clubs") and the Major League Baseball Players Association ("Players") regarding the ownership of the broadcast rights to the Players' performances during major league baseball games. After decades of negotiation concerning the allocation of revenues from telecasts of the games, the Players in May of 1982 sent letters to the Clubs, and to television and cable companies with which the Clubs had contracted, asserting that the telecasts were being made without the Players' consent and that they misappropriated the Players' property rights in their performances. The mailing of these letters led the parties to move their dispute from the bargaining table to the courtroom.

On June 14, 1982, the Clubs filed an action (entitled *Baltimore Orioles, Inc. v. Major League Baseball Players Association*, No. 82 C 3710) in the United States District Court for the Northern District of Illinois, in which they sought a declaratory judgment that the Clubs possessed an exclusive right to broadcast the games and owned exclusive rights to the telecasts. Each count sought essentially the same relief, but was premised upon a different theory: Count I was based upon copyright law, in particular the "works made for hire" doctrine of 17 U.S.C. § 201(b); Count II rested upon state master-servant law; Count III was predicated upon the collective bargaining agreement between the Clubs and the Players, including the Uniform Player's Contract; and Count IV was based upon the parties' customs and dealings.

On July 1, 1982, three major league players brought an action (entitled *Rogers v. Kuhn*, No. 82 C 6377) against the Clubs in the United States District Court for the Southern District of New York. The three players (whom we also refer to as the "Players") sought a declaration that the game telecasts misappropriated their property rights in their names, pictures, and performances, and also asked for damages and injunctive relief. The *Rogers* complaint asserted six claims for relief, based upon the Players' alleged property rights in their names, pictures, and performances, the doctrine of unjust enrichment, and sections 50 and 51 of the New York Civil Rights Statute, N.Y. Civ. Rights Law §§ 50-51. After the district court in Chicago denied a motion to transfer the *Baltimore Orioles* action to New York, the parties stipulated to a transfer of the *Rogers* suit from New York to Chicago, and to consolidation of the two cases.

The parties moved for summary judgment on Counts I and II of the *Baltimore Orioles* complaint, which concerned the Clubs' copyright and master-servant claims. On May 23, 1985, the district court granted the Clubs summary judgment on these two counts. *See Baltimore Orioles, Inc. v. Major League Baseball Players Association*, Copyright L. Dec. (CCH) ¶ 25,822 (N.D. Ill. 1985). On June 14, 1985, the Players filed a notice of appeal from the grant of summary judgment for the Clubs in the *Baltimore Orioles* action.

II

A. *Appellate Jurisdiction*

Before proceeding to the merits, we must pause to consider whether we have jurisdiction over this appeal. 28 U.S.C. § 1291 grants the courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States." It is axiomatic that § 1291 is jurisdictional, *see, e.g.*, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 760 F.2d 177, 180 (7th Cir. 1985), that appellate jurisdiction cannot be conferred by consent of the parties, *see*,

e.g., *Kaszuk v. Bakery & Confectionary Union & Industry International Pension Fund*, 791 F.2d 548, 552 (7th Cir. 1986), and that this court has the right, indeed the duty, *sua sponte*, to ascertain whether we possess jurisdiction over an appeal, *see*, *e.g.*, *Christianson v. Colt Industries Operating Corp.*, No. 86-1145, slip op. at 8-9 (7th Cir. Aug. 19, 1986); *In re Barker*, 768 F.2d 191, 192 (7th Cir. 1985); *Motorola, Inc. v. Computer Displays International, Inc.*, 739 F.2d 1149, 1153 (7th Cir. 1984).

In this case, the district court's May 23, 1985, order granted summary judgment for the Clubs on two of the four counts in the *Baltimore Orioles* complaint. Although the May 23 order did not expressly grant judgment on the remaining two counts in the *Baltimore Orioles* complaint or on any of the counts in the *Rogers* complaint, the district court on the same day entered judgment for the Clubs and against the Players in both actions.[1] During oral argument we raised the issue of our appellate jurisdiction to determine whether the May 23 order was an appealable final decision. In response to our inquiry, the parties submitted an amended judgment order dated January 27, 1986, expressly dismissing the *Rogers* complaint and Counts III and IV of the *Baltimore Orioles* complaint *nunc pro tunc* to May 23, 1985.

In general, a decision is final for the purpose of § 1291 if it ends the litigation on the merits and leaves nothing for the district court to do but execute the judgment. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981); *Catlin v. United States*, 324 U.S. 229, 233 (1945); *St. Louis, Iron Mountain & Southern Railroad v. Southern Express Co.*, 108 U.S. 24, 28-29 (1883). Judged by this standard, the district court's May 23 order was a final decision because it effectively terminated the litigation on the merits. It is true that the May 23 order did not explicitly grant judgment on Counts III and IV of the *Baltimore Orioles* complaint and on each of the counts in the *Rogers* complaint; however, as the amended

1. Judgment was entered on a separate document as required by Fed. R. Civ. P. 58.

judgment order makes clear, the parties had abandoned those claims. We have held that an order that effectively ends the litigation on the merits is an appealable final judgment even if the district court did not formally enter judgment on a claim that one party has abandoned. *See American National Bank & Trust Co. of Chicago v. Bailey*, 750 F.2d 577, 580-81 (7th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 2324 (1985); *see also American Family Mutual Insurance Co. v. Jones*, 739 F.2d 1259, 1261 n.1 (7th Cir. 1984). We therefore conclude that the May 23 order was an appealable final decision from which the Players filed a timely notice of appeal. Hence, we have jurisdiction to decide this dispute.

B. *Copyright Claim*

The Clubs sought a declaratory judgment "that the telecasts of Major League Baseball games constitute copyrighted 'works made for hire' in which defendant and Major League Baseball players have no rights whatsoever." *Baltimore Orioles* Complaint, Prayer for Relief ¶ 1. The district court found that the Clubs, not the Players, owned a copyright in the telecasts as works made for hire and that the Clubs' copyright in the telecasts preempted the Players' rights of publicity in their performances. *See Baltimore Orioles*, 1985 Copyright L. Dec. at 19,732. Accordingly, it granted summary judgment and entered final judgment for the Clubs on this claim. The Players argue that the district court erred in holding that a baseball player's live performance, as embodied in a copyrighted telecast of the game, constitutes a work made for hire so as to extinguish the player's right of publicity in his performance.[2]

1. *Works Made for Hire Under 17 U.S.C. § 201(b)*

Our analysis begins by ascertaining whether the Clubs own a copyright in the telecasts of major league baseball games. In

2. Although the Players generally claim "property rights" in their performances, they specifically assert only the right of publicity. Hence, we shall consider the Players' mention of property rights to refer only to their right of publicity.

general, copyright in a work "vests initially in the author or authors of the work," 17 U.S.C. § 201(a); however, "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." 17 U.S.C. § 201(b).[3] A work made for hire is defined in pertinent part as "a work prepared by an employee within the scope of his or her employment." 17 U.S.C. § 101.[4] Thus, an employer owns a copyright in a work if (1) the work satisfies the generally applicable requirements for copyrightability set forth in 17 U.S.C. § 102(a), (2) the work was prepared by an employee, (3) the work was prepared within the scope of the employee's employment, and (4) the parties have not expressly agreed otherwise in a signed, written instrument.

a. *Copyrightability of the telecasts*

The district court concluded that the telecasts were copyrightable works. We agree. Section 102 sets forth three conditions for copyrightability: first, a work must be fixed in tangible form; second, the work must be an original work of authorship; and third, it must come within the subject matter of copyright.[5] *See* 17 U.S.C. § 102(a). Although there may

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3. The parties do not dispute that the Clubs' copyright claim is governed by the provisions of the Copyright Act of 1976, rather than the 1909 enactment. Because the Clubs did not seek a declaration of their rights in any works created before January 1, 1978, the effective date of the 1976 Act, we need not consider the provisions of the 1909 Act, or address whether the 1976 Act applies retroactively. *Cf. Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983) (1976 Act's codification of the "work made for hire" doctrine does not apply retroactively).

4. This case does not call upon us to address the separate provisions for certain specially commissioned works that are set forth in the definition of a "work made for hire" at 17 U.S.C. § 101.

5. "The two fundamental criteria of copyright protection [are] . . . originality and fixation in tangible form." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 51, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5664. These requirements have been derived from the Constitu-

have been some question at one time as to whether simultaneously recorded live broadcasts were copyrightable, this is no longer the case. Section 101 expressly provides that "[a] work consisting of sounds, images, or both, that are being transmitted, is 'fixed' . . . if a fixation of the work is being made simultaneously with its transmission." Since the telecasts of the games are videotaped at the same time that they are broadcast, the telecasts are fixed in tangible form. *See National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 731-32 (8th Cir. 1986); *see also* H.R. Rep. No. 1476, 94th Cong., 2d. Sess. 52 ("House Report"), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5665.

Moreover, the telecasts are original works of authorship. The requirement of originality actually subsumes two separate conditions, *i.e.*, the work must possess an independent origin and a minimal amount of creativity.[6] *See, e.g., L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir.) (en banc), *cert. denied*, 429 U.S. 857 (1976); *Withol v. Wells*, 231 F.2d 550, 553 (7th Cir. 1956); *see also* M. Nimmer, *Nimmer on Copyright* § 2.01 (1985) ("Nimmer"). It is obvious that the telecasts are independent creations, rather than reproductions of earlier works.

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tion's limited grant of authority to the Congress "[t]o promote the . . . useful Arts, by securing for limited times to Authors . . . the exclusive Right to their . . . Writings." U.S. Const. art. I, § 8, cl. 8; *see* M. Nimmer, *Nimmer on Copyright* §§ 1.06[A], 1.08[A]-[C] (1985).

6. It is important to distinguish among three separate concepts—originality, creativity, and novelty. A work is original if it is the independent creation of its author. A work is creative if it embodies some modest amount of intellectual labor. A work is novel if it differs from existing works in some relevant respect. For a work to be copyrightable, it must be original and creative, but need not be novel. (Thus, in contrast to patent law, a work that is independently produced by two separate authors may be copyrighted by both.) *See generally* Nimmer, §§ 1.06[A], 1.08[C][1], 2.01[A]-[B]. Although the requirements of independent creation and intellectual labor both flow from the constitutional prerequisite of authorship and the statutory reference to original works of authorship, courts often engender confusion by referring to both concepts by the term "originality." For the sake of clarity, we shall use "originality" to mean independent authorship and "creativity" to denote intellectual labor.

As for the telecasts' creativity, courts long have recognized that photographing a person or filming an event involves creative labor. *See, e.g., Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884). For example, one court held that the Zapruder film of the Kennedy assassination was copyrightable because it embodied

> many elements of creativity. Among other things, Zapruder selected the kind of camera (movies, not snapshots), the kind of film (color), the kind of lens (telephoto), the area in which the pictures were to be taken, the time they were to be taken, and (after testing several sites) the spot on which the camera would be operated.

Time Inc. v. Bernard Geis Associates, 293 F. Supp. 130, 143 (S.D.N.Y. 1968). The many decisions that must be made during the broadcast of a baseball game concerning camera angles, types of shots, the use of instant replays and split screens, and shot selection similarly supply the creativity required for the copyrightability of the telecasts. *See* House Report at 52, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5665 ("When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent to the public and in which order, there is little doubt that what the cameramen and the director are doing constitutes 'authorship.' ").[7]

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7. The Players argue that their performances are not copyrightable works because they lack sufficient artistic merit. We disagree. Only a modicum of creativity is required for a work to be copyrightable. *See L. Batlin & Son*, 536 F.2d at 486; *Gilles-Widmer Co. v. Milton Bradley Co.*, 313 F.2d 143, 146 (7th Cir.), *cert. denied*, 373 U.S. 913 (1963); *Withol*, 231 F.2d at 553; *Alfred Bell & Co. v. Catalda*, 191 F.2d 99, 102 (2d Cir. 1951) (Frank, J.). *See generally* Nimmer, §§ 1.08[C][1], 2.01[B], 2.08[B][1]. Contrary to the Players' contentions, aesthetic merit is not necessary for copyrightability. *See* House Report at 51, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5664. A recording of a performance generally includes creative contributions by both the director and other individuals responsible for recording the performance and by the performers whose performance is captured. *See* House Report at 56, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5669 (referring to sound recordings). Judged by the above standard, the

Furthermore, the telecasts are audiovisual works, which under § 102[8] come within the subject matter of copyright. *See* 17 U.S.C. § 101 (definition of "[a]udiovisual works")[9]; *see also WGN Continental Broadcasting Co. v. United Video,*

Players' performances possess the modest creativity required for copyrightability. As Justice Holmes once declared, "if . . . [certain works] command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903) (holding circus poster copyrightable). Courts thus should not gainsay the copyrightability of a work possessing great commercial value simply because the work's aesthetic or educational value is not readily apparent to a person trained in the law. That the Players' performances possess great commercial value indicates that the works embody the modicum of creativity required for copyrightability.

Moreover, even if the Players' performances were not sufficiently creative, the Players agree that the cameramen and director contribute creative labor to the telecasts. The work that is the subject of copyright is not merely the Players' *performances*, but rather the *telecast* of the Players' performances. The creative contribution of the cameramen and director alone suffices for the telecast to be copyrightable.

8. Section 102(a) provides:

> Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
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> (1) literary works;
>
> (2) musical works, including any accompanying words;
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> (3) dramatic works, including any accompanying music;
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> (4) pantomimes and choreographic works;
>
> (5) pictorial, graphic, and sculptural works;
>
> (6) motion pictures and other *audiovisual works*; and
>
> (7) sound recordings.

17 U.S.C. § 102(a) (emphasis added).

9. "Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

17 U.S.C. § 101.

Inc., 693 F.2d 622, 627-28 (7th Cir. 1982) (teletext included in news broadcasts is a copyrightable audiovisual work); *cf. Midway Manufacturing Co. v. Artic International, Inc.*, 704 F.2d 1009, 1012 (7th Cir.) (video games are copyrightable audiovisual works), *cert. denied*, 464 U.S. 823 (1983). The telecasts are, therefore, copyrightable works.

b. *Employer-employee relationship*

With regard to the relationship between the Clubs and the Players, the district court found, and the Players do not dispute, that the Players are employees of their respective Clubs. We add only that this finding is consistent with the broad construction given to the term "employee" by courts applying the "work made for hire" doctrine. *See Evans Newton Inc. v. Chicago Systems Software*, 793 F.2d 889, 894 (7th Cir. 1986) (a person acting under another's direction and supervision is an employee for the purpose of the work made for hire doctrine); *Aldon Accessories v. Spiegel, Inc.*, 738 F.2d 548, 551-53 (2d Cir.) (same), *cert. denied*, ____ U.S. ____, 105 S. Ct. 387 (1984).

c. *Scope of employment*

The district court further found that the scope of the Players' employment encompassed the performance of major league baseball before "live and remote audiences." *See Baltimore Orioles*, 1985 Copyright L. Dec. at 19,731. On appeal the Players argue that there exist genuine issues of material fact as to whether the performance of baseball for televised audiences is within the scope of the Players' employment. Nevertheless, the Players failed to raise this contention in timely fashion. In their briefs and argument before the district court, the Players asserted several reasons that telecasts of major league baseball games might not be works made for hire. *See* Players' Memorandum in Opposition to the Owners' Motion for Summary Judgment and in Support of the Players' Cross-Motion for Summary Judgment on the Copyright Claim 101-18 ("Players' Summary Judgment Memorandum"); Transcript of Summary Judgment Hearing 40-43. However, they never claimed that the

performance of baseball before televised audiences was not within the scope of their employment. Indeed, the only issue as to which Players argued that there was a genuine issue of material fact concerned the parties' written agreements respecting ownership of the telecasts' copyright. *See* Players' Summary Judgment Memorandum 118. It is axiomatic that an argument of this kind is waived if it is not brought before the district court. *See, e.g., Libertyville Datsun Sales, Inc. v. Nissan Motor Corp.*, 776 F.2d 735, 737 (7th Cir. 1985) (citing cases); *Hershinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984). The Players, therefore, failed to preserve this argument.

Moreover, even on appeal, the Players do not identify any evidence that would create a genuine issue of material fact as to the scope of the Players' employment. In contrast to the Players' perfunctory claim that playing baseball for television audiences is not within the scope of their employment, *see* Appellant's Brief 29, the Clubs brought forth detailed evidence in support of their motion for summary judgment that the scope of the Players' employment encompassed performances before broadcast audiences. *See* Memorandum of Law in Support of the Major League Baseball Clubs' Motion for Summary Judgment 6, 9-10.[10] Because of the Players' failure to point to any evidence to the contrary, we would not reverse the district court's finding that the performance of baseball before remote audiences is within the Players' scope of employment even if the Players had preserved their contention. *See, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, ___ U.S. ___, ___, 106 S. Ct. 1348, 1356 (1986) (a party who opposes summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts").

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10. For example, the Clubs adduced evidence that the Players are acutely aware of the fact that major league baseball games are televised, and that the Players understand that television revenues have a bearing on the level of the salaries that they receive.

d. *Written agreements*

Because the Players are employees and their performances before broadcast audiences are within the scope of their employment, the telecasts of major league baseball games, which consist of the Players' performances, are works made for hire within the meaning of § 201(b). *See* Nimmer, § 5.03[D] (the parties can change the statutory presumption concerning the ownership of a copyright in a work made for hire, but cannot vary the work's status as a work made for hire). Thus, in the absence of an agreement to the contrary, the Clubs are presumed to own all of the rights encompassed in the telecasts of the games. The district court found that there was no written agreement that the Clubs would not own the copyright to the telecasts, and, therefore, that the copyright was owned by the Clubs. As noted above, the Players argued before the district court and on appeal that genuine issues of material fact concerning the parties' agreements as to ownership of the copyright precluded resolution of this issue before a trial on the merits.

The provisions of the three written agreements on which the Players rely to establish a genuine issue of material fact are paragraph 3(c) of the Uniform Player's Contract, paragraph 7 of the Benefit Plan, and article X of the Basic Agreement. First, the Uniform Player's Contract is the standard form contract between individual players and their respective clubs. In 1947, the first year that the Clubs sold network television rights to major league baseball games, the following language was added to the contract:

> The Player agrees that his picture may be taken for still photographs, motion pictures or television at such times as the Club may designate and that all rights in such pictures shall belong to the Club and may be used by the Club for publicity purposes in any manner it desires.

Uniform Player's Contract ¶ 3(c). The language of paragraph 3(c) has remained materially unchanged over the years.

Second, the Benefit Plan sets forth the particulars of the Players' pension fund. First entered into in 1967, the Benefit

Plan arose in large part out of the parties' long-standing dispute as to the allocation of national television revenues to the pension fund. In negotiations over the 1969 Benefit Plan, the Players asserted their long-held claim that broadcasts of baseball games without their consent violated their rights of publicity in their performances. The Clubs, however, maintained that the Players had no rights whatsoever in the telecasts. The parties accordingly agreed to the following compromise provision:

> The execution of this Agreement shall not be deemed to change any rights or obligations of the Clubs or the players with respect to the funding of the Plan (except to the extent set forth in other Paragraphs of this Agreement) or with respect to radio and television, as such rights and obligations existed immediately after the execution of the Agreement Re Major League Baseball Players Benefit Plan of January 1, 1967.

1969 Benefit Plan ¶ 7. Identical provisions have been incorporated in every Benefit Plan negotiated since 1969.

Third, the Basic Agreement represents the collective bargaining agreement between the Players and the Clubs. The original Basic Agreement entered into in 1968 provided that grievances would be arbitrated by the Commissioner of Baseball. When the parties entered into the 1970 Basic Agreement, they agreed to arbitration of grievances by a tripartite panel, rather than by the Commissioner; however, the Clubs did not agree to submit to impartial arbitration those disputes concerning the right to broadcast major league baseball games. The parties thus agreed that:

> Anything in the Grievance Procedure provided for in the Basic Agreement to the contrary notwithstanding, complaints or disputes as to any rights of the Players or the Clubs with respect to the sale or proceeds of sale of radio or television broadcasting rights in any baseball games by any kind or method of transmission, dissemination or reception shall not be subject to said Grievance Procedure. However, nothing herein or in the Grievance

> Procedure shall alter or abridge the rights of the parties, or any of them, to resort to a court of law for the resolution of such complaint or dispute.

1970 Basic Agreement art. X. This language has been included verbatim in each Basic Agreement entered into since 1970.

The Players contend that these three provisions create a genuine issue of material fact with respect to the parties' agreements concerning the ownership of the copyright to the telecasts. We disagree. Section 201(b) states that the employer owns the copyright in a work made for hire "unless the parties have expressly agreed otherwise in a written instrument signed by them." The requirement that an agreement altering the presumption that an employer owns the copyright in a work made for hire represents a substantial change in the "work made for hire" doctrine. Under prior law, "such an agreement could be either *oral* or *implied*." Nimmer, § 5.03[D] (emphasis added); *see also May v. Morganelli-Heumann & Associates*, 618 F.2d 1363, 1369 (9th Cir. 1980) (alleged custom that architect retains the copyright in his drawings unless the parties otherwise agree raises material issue of fact). However, § 201(b) requires that an agreement altering the statutory presumption be both *written* and *express*. In essence, this provision is a statute of frauds. *See Roth v. Pritikin*, 787 F.2d 54, 56 (2d Cir. 1986) (discussing parallel provision for specially commissioned works in 17 U.S.C. § 101).

In this case, the parties have not expressly agreed to rebut the statutory presumption that the Clubs own the copyright in the telecasts. Paragraph 3(c) of the Uniform Player's Contract does not declare that the copyright in the telecasts is owned by the Players, rather than by the Clubs. Instead, it merely grants the Clubs the rights to take the Players' pictures for still photographs, motion pictures, and television and to use the pictures for publicity purposes. A limitation on the Clubs' rights to televise the Players' performances perhaps might be implied by the grant of these particular rights;[11] however, even

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11. The Players rely on the common law maxim of construction *expressio unius est exclusio alterius*, under which the expression of one right

if such an implied limitation were plausible, paragraph 3(c) nowhere contains an express statement that the Clubs do not own the copyright in the telecasts of the Players' performances.

Paragraph 7 of the Benefit Plan and Article X of the Basic Agreement similarly do not declare that the Players, rather than the Clubs, own the copyright in the telecasts. The two provisions simply preserved whatever rights in the telecasts that the parties might possess and reserved each party's right to have disputes concerning television rights be resolved in court, rather than by arbitration. They nowhere state that either the Clubs or the Players own the copyright in the telecasts.[12] These provisions thus do not represent an express agreement that the Players own the copyright in the telecasts. If anything, they reflect the parties' express disagreement as to the copyright's ownership.

The Players also argue that these three provisions must be read in light of the agreements' collective bargaining history, and that the circumstances surrounding the agreements cannot be determined without a trial.[13] We disagree. Under § 201(b), an agreement altering the statutory presumption that the employer owns the copyright in a work made for hire must be express. This is to say, the parties' agreement must appear on the face of the signed written instrument. Section 201(b) thus

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implies the exclusion of another right that is not expressed. This maxim is, however, inapplicable to ascertaining whether the parties have *expressly* agreed in a signed, written instrument that the Players own the copyright in the telecasts of the games.

12. The Players point to the absence of a provision expressly granting the Clubs the right to televise the games as support for their assertion that they have "reserved" their rights of publicity in their performances. Nonetheless, there is no need for such an express declaration because under § 201(b) the Clubs are presumed to own the copyright in the works produced by their employees unless the parties expressly agree otherwise in a signed, written instrument.

13. The Players rely on labor law cases concerning the construction of collective bargaining agreements. Such cases, however, have no bearing on the consideration in a copyright case of the parties' agreements concerning the ownership of the copyright in a work made for hire.

bars the use of parol evidence to imply a provision not found within the four corners of the parties' agreement.[14] *Cf. Arthur Retlaw & Associates v. Travenol Laboratories, Inc.*, 582 F. Supp. 1010, 1014 (N.D. Ill. 1984) (letter signed by only one party does not constitute a signed, written instrument under § 201(b)). Moreover, even if extrinsic evidence were admissible to explain an ambiguity in the parties' agreement, the provisions relied upon by the Players are unambiguous with respect to the ownership of the copyright in the telecasts. Since the contractual terms regarding television rights are clear, it is unnecessary to examine the parties' collective bargaining history to ascertain the meaning of the agreements.[15]

The Players further assert that the parties' traditional practice of devoting approximately one-third of the revenues derived from nationally televised broadcasts to the Players' pension fund establishes a genuine issue of material fact as to the ownership of the copyright in these telecasts.[16] We disagree.

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14. Congress considered incorporating in § 201(b) the "shop right" doctrine of patent law under which the employer would acquire the right to use the employee's work to the extent needed for the purposes of the employer's regular business, but the employee would retain all other rights so long as he or she refrained from authorizing competing uses. Congress rejected this change because it would create uncertainty as to the ownership of the copyright in a work made for hire. *See* House Report at 121, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5737. To allow parol evidence to supply a contractual term that does not expressly appear on the face of the written instrument similarly would engender uncertainty as to the ownership of the copyright and would frustrate the purpose underlying § 301(a)'s "statute of frauds" provision.

15. In any event, the collective bargaining history behind the parties' agreements similarly reflects a sharp dispute as to the ownership of the television rights to the games. *A fortiori*, it cannot establish that the parties agreed that the Players would own the copyright in the televised broadcasts.

16. The Players do not claim that they traditionally have received some share of the revenues from locally televised broadcasts. Therefore, even under the Players' analysis, the division of revenues from *national broadcasts* does not create a genuine issue of material fact as to the ownership of the copyright in *local telecasts*. Moreover, the Clubs contest the assertion that they traditionally have devoted to the

The allocation of revenues from nationally televised broadcasts is determined by the parties' relative bargaining strength and ability. Depending on the Players' bargaining power, they can negotiate a greater or a lesser share of the national telecast revenues.[17] Nevertheless, there is no relationship between the division of *revenues* from nationally televised broadcasts and the ownership of *rights* in those telecasts. For example, a motion picture star might negotiate to receive a certain number of "points" from a film's profits; however, that she shares in the film's profits does not mean that she owns some share of the copyright in the film. (Indeed, the producer most likely holds the copyright in the work.) Just as the ownership of points in a film's profits does not represent a proportionate ownership of the copyright in the film, the Players' receipt in the form of pension contributions of a certain fraction of the revenues from nationally televised broadcasts in no way suggests that they own any part of the copyright in the telecasts.

We thus conclude that there are no genuine issues of material fact as to the ownership of the copyright in the telecasts, and that the parties did not expressly agree to rebut the statutory presumption that the employer owns the copyright in a work made for hire. We, therefore, hold that the Clubs own the copyright in telecasts of major league baseball games.[18]

Players' pension fund approximately one-third of the revenues from nationally televised broadcasts. They argue that since it was first entered into in 1967, the Benefit Plan simply has provided for the Clubs to contribute to the pension plan a flat dollar amount from whatever source of revenue they choose, and never has required the Clubs to contribute any amount, let alone one-third, of the national telecast revenues. Nonetheless, as our subsequent discussion indicates, we need not resolve this dispute because it is not material to the ownership of the copyright in the national telecasts.

17. *Cf.* Quinn & Warren, *Professional Team Sports New Legal Arena: Television and the Player's Right of Publicity*, 16 Ind. L. Rev. 487, 510 n.102 (1983) (baseball players' limited share in the revenues from televised broadcasts "appears to have been derived from the general give-and-take of the collective bargaining process, rather than from right of publicity considerations").

18. We have not been called upon to decide whether the copyrights in the telecasts of the various games are owned separately by individual clubs

2. *Preemption under 17 U.S.C. § 301(a)*

Although the Clubs own the copyright to the telecasts of major league baseball games, the Players claim that broadcasts of these games made without their express consent violate their rights to publicity in their performances. For the reasons stated below, we hold that the Clubs' copyright in the telecasts of major league baseball games preempts the Players' rights of publicity in their game-time performances.

Section 301(a) of Title 17 provides that

> all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103,[19] whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a).[20] This provision sets forth two conditions that both must be satisfied for preemption of a right under

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or jointly by some combination of clubs. We also have not been asked to determine whether the copyrights in the telecasts are owned exclusively by the Clubs or jointly by the Clubs and the television stations or networks that record and broadcast the games. We express no opinion on these issues.

19. 17 U.S.C. § 103, which provides that the subject matter of copyright includes compilations and derivative works, is not pertinent to this appeal.

20. Section 301(a) has been termed "the most fundamental change in the copyright system 'since its inception.' " Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 Cornell L. Rev. 673, 701 (1981) (quoting U.S. Copyright Office, *General Guide to the Copyright Act of 1976* 2:1 (1977)). Before the Copyright Act of 1976 became effective, there had been a dual system of federal statutory and state common-law copyright protection in effect in the United States since the first copyright statute in 1790. *See* House Report at 129, *reprinted in* 1976 U.S. Code Cong. & Ad. News

state law: First, the work in which the right is asserted must be fixed in tangible form and come within the subject matter of copyright as specified in § 102. Second, the right must be equivalent to any of the rights specified in § 106. *See Donald Frederick Evans & Associates, Inc. v. Continental Homes, Inc.*, 785 F.2d 897, 913-14 (11th Cir. 1986); *Ehat v. Tanner*, 780 F.2d 876, 878 (10th Cir. 1985); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 199-200 (2d Cir. 1983), *rev'd on other grounds*, ____ U.S. ____, 105 S. Ct. 2218 (1985); *see also* Nimmer, § 1.01[B].

a. *Section 102 test*

The works in which the Players claim rights are the telecasts of major league baseball games. As established above, the telecasts are fixed in tangible form because they are recorded simultaneously with their transmission and are audiovisual works which come within the subject matter of copyright. The first condition for preemption is, therefore, satisfied.

The Players argue, however, that the works in which they claim rights are their performances, rather than the telecasts of the games in which they play, and that performances *per se* are not fixed in tangible form.[21] They contend that, since the

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at 5745. Under that system, federal coyright protection was available only for published works. *See* Nimmer, §§ 4.01-.02. In addition to federal copyright protection, common-law copyrights were available under state law for unpublished works, *see Wheaton v. Peters*, 33 U.S. (8 Peters) 591, 657 (1834), and for published works that were not afforded federal copyright protection, *see Goldstein v. California*, 412 U.S. 546, 569 (1973). The 1976 Act dramatically altered this dual system of copyright protection in two ways. First, as discussed above, § 102(a) extended federal copyright protection to all works fixed in any tangible medium of expression, including simultaneously recorded "live" works, whether they are published or unpublished. More importantly, however, § 301 expressly preempted rights under state law that are equivalent to any of the bundle of rights encompassed by a federal copyright.

21. To support their argument that their performances cannot be copyrighted, the Players refer to the "Sound Recording Performance Rights Amendment," S. 1552 and H.R. 997, 96th Cong., 1st Sess. (1979), an unsuccessful attempt to amend the Copyright Act to grant certain performance rights to sound recording artists. Nevertheless, that a

works in which they assert rights are not fixed in tangible form, their rights of publicity in their performances are not subject to preemption. We disagree. Under § 101, "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . , by or under the authority of the author, is sufficiently permanent and stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." The Players' performances are embodied in a copy, *viz*, the videotape of the telecast, from which the performances can be perceived, reproduced, and otherwise communicated indefinitely. Hence, their performances are fixed in tangible form, and any property rights in the performances that are equivalent to any of the rights encompassed in a copyright are preempted.

It is, of course, true that unrecorded performances *per se* are not fixed in tangible form. Among the many such works not fixed in tangible form are "choreography that has never been filmed or notated, an extemporaneous speech, 'original works of authorship' communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down." House Report at 131, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5747. Because such works are not fixed in tangible form, rights in such works are not subject to preemption under § 301(a). Indeed, § 301(b), which represents the obverse of § 301(a), expressly allows the states to confer common law copyright protection upon such works, *id.*; *see also* Nimmer §§ 1.08[C], 2.03[B], and protec-

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Congress, for a reason that we cannot discern, has not enacted an amendment has little or no bearing on the construction of a statute enacted by an earlier Congress. *Cf. Benson v. Allphin*, 786 F.2d 268, 275 n.15 (7th Cir. 1986) (discussing difficulty of construing congressional acquiescence in judicial decisions). In this case, the failure to enact the "Sound Recording Performance Rights Amendment" does not establish that the contributions of recording artists (and, by analogy, the performances of the Players) cannot presently be copyrighted. If anything, it suggests merely that recording artists are not entitled to royalties from the compulsory licensing of sound recordings.

tion has been afforded to unfixed works by some states. *See, e.g.*, Cal. Civil Code § 980 (West 1982 & 1986 Supp.) (protecting "any original work of authorship that is not fixed in any tangible medium of expression"); *cf. Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968) (common law copyright might be recognized in contents of an unrecorded conversation). Nonetheless, once a performance is reduced to tangible form, there is no distinction between the performance and the recording of the performance for the purpose of preemption under § 301(a). Thus, if a baseball game were not broadcast or were telecast without being recorded, the Players' performances similarly would not be fixed in tangible form and their rights of publicity would not be subject to preemption. *See* Nimmer, § 1.08[C] (using the example of a live broadcast of a baseball game). By virtue of being videotaped, however, the Players' performances are fixed in tangible form, and any rights of publicity in their performances that are equivalent to the rights contained in the copyright of the telecast are preempted.[22]

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22. An example illustrates this point. Take the case of *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), in which Hugo Zacchini sued a television station for violating his right of publicity by broadcasting the entirety of his human cannonball act. *Zacchini* was decided before § 301(a) became effective, but let us suppose that the same case arises again today. Assuming that Zacchini did not videotape or otherwise record his performance, his human cannonball act would not be fixed in tangible form and could not be copyrighted. Nonetheless, because the work in which he asserts rights would not be fixed in a tangible medium of expression, his right of publicity in his performance would not be subject to preemption. Thus, if a television station were to broadcast his act, he still could sue successfully for violation of his right of publicity in his performance. Merely that the television station might videotape its telecast would not grant the station a copyright in the broadcast of Zacchini's performance or preempt Zacchini's right of publicity. To be "fixed" in tangible form, a work must be recorded "by or under the authority of the author," here Zacchini. *See* 17 U.S.C. § 101 (definition of "fixed"). Because Zacchini did not consent to the telecast, the broadcast could not be "fixed" for the purpose of copyrightability and Zacchini's right of publicity would not be subject to preemption.

Assume, however, that Zacchini, after the fashion of championship prize fights, transmitted his live act over closed-circuit television and simultaneously recorded it for later broadcast over a cable television

The Players also contend that to be a "work[ ] of authorship that . . . [is] fixed in a tangible medium of expression" within the scope of § 301(a), a work must be copyrightable. They assert that the works in which they claim rights, namely their performances, are not copyrightable because they lack sufficient creativity. They consequently conclude that because the works in which they claim rights are not works within the meaning of § 301(a), their rights of publicity are not subject to preemption. There is a short answer to this argument. Congress contemplated that "[a]s long as a work fits within one of the general subject matter categories of section 102 and 103, . . . [section 301(a)] prevents the States from protecting it even if it fails to achieve Federal copyright because it is too minimal or lacking in originality to qualify." House Report at 131, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5747.[23] Hence, § 301(a) preempts all equivalent state-law rights claimed in any work within the subject matter of copyright whether or not the work embodies any creativity. Regardless of the creativity of the Players' performances, the works in which they assert rights are copyrightable works which come within the scope of § 301(a) because of the creative contributions of the individuals responsible for recording the Players' performances. Therefore, the Players' rights of publicity in their

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network, and that the satellite signal for the closed-circuit show was intercepted and rebroadcast by a television station. Zacchini sues the station for violation of his copyright and his right to publicity. He would prevail on the copyright infringement claim only. *See McBee & Bruno's, Inc.*, 792 F.2d at 732; *WGN Continental Broadcasting Co.*, 693 F.2d at 624. Nevertheless, because his act was videotaped, the work in which he asserts rights would be fixed in tangible form and thus copyrightable. Assuming *arguendo* that a right of publicity is equivalent to one of the rights encompassed in a copyright—a subject that we soon shall take up—his right of publicity in his performance would be preempted. *See* Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 Cornell L. Rev. 673, 710-11 (1981).

23. The reason that § 301(a) preempts rights claimed in works that lack sufficient creativity to be copyrightable is to prevent the states from granting protection to works which Congress has concluded should be in the public domain.

performances are preempted if they are equivalent to any of the bundle of rights encompassed in a copyright.[24]

b. *Section 106 test*

A right under state law is "equivalent" to one of the rights within the general scope of copyright if it is violated by the exercise of any of the rights set forth in § 106.[25] *See Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656, 662-63 (6th Cir. 1982), *aff'g in pertinent part*, 496 F. Supp. 408, 443-44 (S.D. Ohio 1980) (right is equivalent if it creates or destroys right

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24. The Players' rights of publicity in their performances are preempted only if they would be violated by the exercise of the Clubs' copyright in the telecasts. A Player's right of publicity in his name or likeness would not be preempted if a company, without the consent of the Player, used the player's name to advertise its product, *cf. Cepeda v. Swift & Co.*, 415 F.2d 1205, 1206 (8th Cir. 1969), placed the player's photograph on a baseball trading card, *cf. Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 148-49 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953), or marketed a game based upon the player's career statistics, *cf. Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970).

25. From the time it was first proposed in 1963 as part of a general revision of copyright law until it reached the floor of the House of Representatives in 1976, the language that became § 301 contained a list of causes of action that were not "equivalent" to a copyright. That list originally consisted of breaches of trust, invasion of privacy, and deceptive trade practices including passing off and false representations, but later came to include such actions as misappropriation, breaches of contract, trespass, conversion, and defamation. Nevertheless, in response to objections by the Department of Justice, *see* Copyright L. Rep. (CCH) ¶ 7305 (setting forth complete text of letters), this provision was deleted in a last-minute amendment on the House floor. Because the House's debate concerning the effect of the amendment is ambiguous, if not contradictory, and because the Senate concurred without discussion in the House's version of § 301, almost any interpretation of the concept of equivalent rights can be inferred from the legislative history. Therefore, in determining whether a particular right is equivalent to a copyright, we place little weight on the deletion of the list of nonequivalent rights. For an excellent discussion of the legislative history of § 301, *see* Abrams, *Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 Sup. Ct. Rev. 509, 537-48. *See also* Nimmer, § 1.01[B][1].

contained in copyright). That section grants the owner of a copyright the exclusive rights to reproduce (whether in original or derivative form), distribute, perform, and display the copyrighted work. *See* 17 U.S.C. § 106; *see also* Nimmer, § 1.01[B][1]. Thus, a right is equivalent to one of the rights comprised by a copyright if it "is infringed by the mere act of reproduction, performance, distribution or display." *Id.*; *see also Donald Frederick Evans & Associates, Inc.*, 785 F.2d at 914; *Ehat v. Turner*, 780 F.2d at 878; *Harper & Row Publishers, Inc.*, 723 F.2d at 200.

In particular, the right to "perform" an audiovisual work means the right "to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101 (definition of "perform"). Thus, the right to perform an audiovisual work encompasses the right to broadcast it. *See* House Report at 63, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5676-77 ("[A] broadcasting system is performing when it transmits . . . [a] performance . . . ; a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers . . . ."); *see also* Nimmer, § 8.14[B]. Hence, a right in a work that is conferred by state law is equivalent to the right to perform a telecast of that work if the state-law right is infringed merely by broadcasting the work.

In this case, the Players claim a right of publicity in their performances. As a number of courts have held, a right of publicity in a performance is violated by a televised broadcast of the performance. *See Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956) (broadcast of boxing match); *Sharkey v. National Broadcasting Co.*, 93 F. Supp. 986 (S.D.N.Y. 1950) (same); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977) (broadcast of commercial depicting bandleader's performance); *Zacchini v. Scripps-Howard Broadcasting Co.*, 54 Ohio 2d 286, 376 N.E.2d 582 (1978), *on remand from* 433 U.S. 562 (1977) (broadcast of human cannonball act). Indeed, from the start of this litigation, the Players consistently have maintained that their rights of public-

ity permit them to control telecasts of their performances, and that televised broadcasts of their performances made without their consent violate their rights of publicity in their performances. *See, e.g.*, *Rogers* Complaint ¶ 15, 30, 40; *Baltimore Orioles* Answer ¶ 43; Players' Summary Judgment Memorandum 14-19; Transcript of Summary Judgment Hearing 40; Appellant's Brief 3. Because the exercise of the Clubs' right to broadcast telecasts of the games infringes the Players' rights of publicity in their performances, the Players' rights of publicity are equivalent to at least one of the rights encompassed by copyright, *viz*, the right to perform an audiovisual work. Since the works in which the Players claim rights are fixed in tangible form and come within the subject matter of copyright, the Players' rights of publicity in their performances are preempted.

The Players argue that their rights of publicity in their performances are not equivalent to the rights contained in a copyright because rights of publicity and copyrights serve different interests.[26] In their view, the purpose of federal

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26. The Players cite to four opinions to support their assertion that § 301(a) does not preempt the right of publicity. *See Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 289 (2d Cir. 1981) (Mansfield, J., dissenting), *cert. denied*, 456 U.S. 927 (1982); *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F. Supp. 1188, 1201 (S.D.N.Y. 1983); *Apigram Publishing Co. v. Factors Etc., Inc.*, No. C 78-525, slip op. (N.D. Ohio July 30, 1980) (available on LEXIS); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 850, 603 P.2d 425, 448, 160 Cal. Rptr. 323, 346 (1979) (Bird, C.J., dissenting). Each opinion is premised upon an erroneous analysis of preemption. The *Factors* dissent, the *Bi-Rite* court, and the *Lugosi* dissent assert without discussion that the right of publicity is not preempted because the work that it protects—a public figure's persona—cannot be fixed in a tangible medium of expression. We disagree. Because a performance is fixed in tangible form when it is recorded, a right of publicity in a performance that has been reduced to tangible form is subject to preemption.

The *Apigram* court stated without extended discussion or citation to authority that the right of publicity is not preempted because it requires additional elements other than the reproduction, performance, distribution or display of a copyrighted work. We disagree. Congress intended that "[t]he evolving common law rights of "privacy," "publicity," and trade secrets and the general law of defamation and fraud, would remain unaffected [by § 301(a)] so long as the causes

copyright law is to secure a benefit to the public, but the purpose of state statutory or common law concerning rights of publicity is to protect individual pecuniary interests. We disagree.

The purpose of federal copyright protection is to benefit the public by encouraging works in which it is interested. To induce individuals to undertake the personal sacrifices necessary to create such works, federal copyright law extends to the authors of such works a limited monopoly to reap the rewards

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of action contain *elements* such as an invasion of privacy or a breach of trust or confidentiality, that are *different in kind from copyright infringement*." House Report at 132, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5748 (emphasis added). Thus, a right is equivalent to a copyright if (1) it is infringed by the mere act of reproduction, performance, distribution, or display, or (2) it requires additional elements to make out a cause of action, but the additional elements do not differ in kind from those necessary for copyright infringement. *See Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 201 (2d Cir. 1983), *aff'g in pertinent part*, 501 F. Supp. 848, 852 (S.D.N.Y. 1980), *rev'd on other grounds*, ___ U.S. ___, 105 S. Ct. 2218 (1985); *cf. Crow v. Wainwright*, 720 F.2d 1224, 1226 (11th Cir. 1983) (publication with scienter not qualitatively different), *cert. denied*, ___ U.S. ___, 105 S. Ct. 89 (1984); *Mayer v. Josiah Wedgewood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985) (reproduction with intent, knowledge, or commercial immorality not different in kind) (discussing cases); *Rand McNally & Co. v. Fleet Management Systems, Inc.*, 591 F. Supp. 726, 739 (N.D. Ill. 1983) (publication with commercial immorality not qualitatively different). Contrary to the belief of the *Apigram* court, the right of publicity does not require an invasion of personal privacy to make out a cause of action. It is true that the rights of publicity and of privacy evolved from similar origins; however, whereas the right of privacy protects against intrusions on seclusion, public disclosure of private facts, and casting an individual in a false light in the public eye, the right of publicity protects against the unauthorized exploitation of names, likenesses, personalities, and performances that have acquired value for the very reason that they are known to the public. *See, e.g., Zacchini*, 433 U.S. at 575-79; *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 832-33, 836 (6th Cir. 1983); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728-29 (S.D.N.Y. 1978); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1279-82 (D. Minn. 1970); *Lombardo*, 58 A.D.2d at 621, 396 N.Y.S.2d at 664. Because the right of publicity does not require a qualitatively different additional element, it is equivalent to a copyright and is preempted to the extent that it is claimed in a tangible work within the subject matter of copyright.

of their endeavors. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). Contrary to the Players' contention, the interest underlying the recognition of the right of publicity also is the promotion of performances that appeal to the public. The reason that state law protects individual pecuniary interests is to provide an incentive to performers to invest the time and resources required to develop such performances. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the principal case on which the Players rely for their assertion that different interests underlie copyright and the right to publicity,[27] the Supreme Court recognized that the interest behind federal copyright protection is the advancement of the public welfare through the encouragement of individual effort by personal gain, *id.* at 576, and that a state's interest in affording a cause of action for violation of the right to publicity "is closely analogous to the goals of patent and copyright law." *Id.* at 573; *see also* Felcher & Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 Yale L.J. 1125, 1129-32 (1980); Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs. 203, 215-16 (1954); Quinn & Warren, *Professional Team Sports New Legal Arena: Television and the Player's Right of Publicity*, 16 Ind. L. Rev. 487, 495 n.45, 498 n.59 (1983); Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 Cornell L. Rev. 673, 681-84 (1981); Note, *State "Copyright" Protection for Performers: The First Amendment Question*, 1978 Duke L.J. 1198, 1214-15, 1222. Because the right of publicity does not differ in kind from

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27. We note that, in an opinion that the Players cite as support for their assertion, California Supreme Court Chief Justice Bird acknowledged that federal copyright protection and recognition of the right of publicity serve similar purposes. *See Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 840, 603 P.2d 425, 441-42, 160 Cal. Rptr. 323, 339-40 (1979) (Bird, C.J., dissenting).

copyright, the Players' rights of publicity in their performances cannot escape preemption.[28]

In this litigation, the Players have attempted to obtain *ex post* what they did not negotiate *ex ante*. That is to say, they seek a judicial declaration that they possess a right—the right to control the telecasts of major league baseball games—that they could not procure in bargaining with the Clubs. The Players' aim is to share in the increasingly lucrative revenues derived from the sale of television rights for over-the-air broadcasts by local stations and national networks and for distribution by subscription and pay cable services. Contrary to the Players' contention, the effect of this decision is not to grant the Clubs perpetual rights to the Players' performances. The Players remain free to attain their objective by bargaining with the Clubs for a contractual declaration that the Players own a joint or an exclusive interest in the copyright of the telecasts.[29]

C. *Master-Servant Claim*

The Clubs sought a judgment "declaring (a) that the plaintiffs, as employers who create the product, Major League Baseball games, own all rights in and to Major League Baseball games, including the right to telecast them, and (b) that the Major League Baseball players, by virtue of their employment, have no rights in and to the product." *Baltimore Orioles*

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28. The Players also claim that the Clubs' copyright provides protection only against third-party infringers who transmit the televised broadcasts without authorization. We disagree. The "work for hire" doctrine grants the Clubs as employers exclusive rights in the telecasts of the games against the Players as employees.

29. The Players also are at liberty to attempt to negotiate a contractual limitation excluding performances before broadcast audiences from their scope of employment. Cf. *Brinkley* v. *Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981) (model who consented to be photographed for certain posters and to filming of modeling session for broadcasts on cable television held to possess cause for action for violation of her right of publicity when additional unauthorized posters were made from photographs taken at the modeling session).

Complaint, Prayer for Relief ¶ 2.[30] The district court found that the Clubs, as employers, retain all rights in their employees' work product. *See Baltimore Orioles*, 1985 Copyright L. Dec. at 19,736. It thus granted summary judgment and entered final judgment for the Clubs on this claim. On appeal, the Players argue that the district court erred in holding that their status as employees extinguished their rights of publicity in their performances.

In particular, the Players assert that they possess rights of publicity in their names, likenesses, and performances, *see Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 148-49 (3d Cir. 1981) (professional baseball player), *cert. denied*, 455 U.S. 1019 (1982); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.) (same), *cert. denied*, 346 U.S. 816 (1953); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (same); *see also Zacchini*, 433 U.S. at 573 n.10, 576, and that their rights of publicity prevent use of their persona without their express written consent. *See, e.g., Dzurenko v. Jordache, Inc.*, 59 N.Y.2d 788, 451 N.E.2d 477, 464 N.Y.S.2d 730 (1983); *see also* N.Y. Civ. Rights Law § 51 (affording cause of action for commercial use of name or picture without prior written consent). They further argue that an employee's right of publicity bars an employer from using the employee's name, picture, or performance without the employee's consent, notwithstanding the master-servant relationship. *See, e.g., Caesar v. Chemical Bank*, 66 N.Y.S.2d 698, 487 N.E.2d 275, 496 N.Y.S.2d 418 (1985), *aff'g* 106 A.D.2d 353, 483 N.Y.S.2d 16 (1984); *Martin v. Senators, Inc.*, 330 Tenn. 465, 418 S.W.2d 660 (1967); *Johnson v. Boeing Airplane*

30. The Clubs' copyright and master-servant claims are distinct. With respect to the first claim, the Clubs contend that their copyright in the simultaneously recorded telecasts of major league baseball games preempts the Players' rights of publicity in their performances. This claim, however, is limited to games that are fixed in tangible form. With respect to the second claim, the Clubs assert that, as employers, they own the right to broadcast the Players' performances, regardless of whether the game is reduced to tangible form. This claim extends to games that are not broadcast or that are televised without being videotaped.

Co., 175 Kan. 275, 262 P.2d 808 (1953). The Clubs respond by contending that, as employers, they possess all ownership interests in the work product that they hire the Players, as employees, to create, *see, e.g.*, *Muenzer v. W.F. & John Barnes Co.*, 9 Ill. App. 2d 391, 133 N.E.2d 312 (1956), and that an employee's right of publicity does not prevent the employer from using the employee's performances when the performances are the very product that the employee was hired to create. *See, e.g.*, *Nelson v. Radio Corp. of America*, 148 F. Supp. 1 (S.D. Fla. 1957); *Autry v. Republic Productions, Inc.*, 104 F. Supp. 918 (S.D. Cal. 1952), *modified on other grounds*, 213 F.2d 667 (9th Cir.), *cert. denied*, 348 U.S. 858 (1954); *Zahler v. Columbia Pictures Corp.*, 180 Cal. App. 2d 582, 4 Cal. Rptr. 612 (1960).

The threshold issue that we must decide is what law governs the Clubs' master-servant claims.[31] The parties offer no assistance. Instead of considering the choice-of-law question, they rely upon "traditional principles of master-servant common law." Appellees' Brief 8; *see* Appellant's Brief 43.[32] Notwithstanding the parties' assumptions to the contrary, master-servant common law exists only with reference to the laws of particular states. As Justice Brandeis once stated, "[t]here is no federal general common law." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). For a federal court to base its decision

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31. With respect to the Clubs' copyright claim, we were not required to determine the state or states whose law governed the Players' rights of publicity in their performances because federal law preempts "any such right or equivalent right in any such work under the common law or statutes *of any state*." 17 U.S.C. § 301(a) (emphasis added).

32. The parties to a lawsuit, within broad limits, can stipulate expressly or impliedly to the law governing their dispute. *See Cates v. Morgan Portable Building Corp.*, 780 F.2d 683, 687-88 (7th Cir. 1985); *cf. Twohy v. First National Bank of Chicago*, 758 F.2d 1185, 1190-91 (7th Cir. 1985) (under Illinois law, choice-of-law stipulations are effective so long as they bear a reasonable relationship to the dispute and do not violate public policy or the court's subject-matter jurisdiction). The Clubs and the Players did not expressly stipulate to the law of any state. Moreover, because they relied on the statutory and common law of well over a dozen states, we cannot conclude that they tacitly stipulated to the law of any one state.

on "established principles of master-servant common law" that are independent of the law of any state would contravene *Erie* by creating a federal common law of master-servant relationships.

In general, a federal district court sitting in diversity, and this court on appeal, must follow the choice-of-law rules of the state in which the district court sits.[33] *See Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496-97 (1941); *see also National Association of Sporting Goods Wholesalers, Inc. v. F.T.L. Marketing Corp.*, 779 F.2d 1281, 1284 (7th Cir. 1985). Although diversity of citizenship is not present in this case, federal courts, reasoning by analogy from diversity cases, have applied *Klaxon* to determine what law governs pendent state claims. *See National Resources Trading, Inc. v. Trans Freight Lines*, 766 F.2d 65, 68 (2d Cir. 1985); *Bi-Rite Enterprises, Inc. v. Bruce Miner Co.*, 757 F.2d 440, 442 (1st Cir. 1985); *McSurely v. McClellan*, 753 F.2d 88, 110 (D.C. Cir.), *cert. denied*, 434 U.S. 888 (1985); *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 49 n.11 (4th Cir. 1983), *cert. denied*, ____ U.S. ____, 105 S. Ct. 1191 (1985); *Rohm & Haas Co. v. Adco Chemical Co.*, 689 F.2d 424, 428-29 (3d Cir. 1982). We agree that the choice-of-law rule for pendent state claims should be that of the forum.

Illinois conflicts law thus governs the choice of law in this case. The Clubs' argument that their rights as employers supercede the Players' rights of publicity might be characterized as either a tort or contract claim. In tort cases, Illinois generally follows the "most significant relationship" approach, under which a court must weigh four factors: the place of the injury, the place of misconduct, the domicile of the parties, and the place where the relationship between the parties is

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33. When the parties fail to consider the choice of law in a diversity case, the substantive law of the forum is presumed to control. *See National Association of Sporting Goods Wholesalers, Inc. v. F.T.L. Marketing Corp.*, 779 F.2d 1281, 1284-85 (7th Cir. 1985). The Players expressly relied upon N.Y. Civ. Rights Law §§ 50-51 to support their contention that their rights of publicity are not extinguished by their status as employees. We thus conclude that it would be inappropriate to invoke such a presumption in this case.

centered. *See International Administrators, Inc. v. Life Insurance Co. of North America*, 753 F.2d 1373, 1376 n.4 (7th Cir. 1985); *Dr. Franklin Perkins School v. Freeman*, 741 F.2d 1503, 1520 & n.23 (7th Cir. 1984); *In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979*, 644 F.2d 594, 611-12 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981). In contract cases, Illinois also generally applies the "most significant relationship" approach, under which the court is to consider five factors: the place of contracting, the place of negotiations, the place of performance, the situs of the subject matter of the contract, and the domicile of the parties. *See Dr. Franklin Perkins School*, 741 F.2d at 1515 n.19.

It would be understating matters to say that the conflicts question in this case is complex. The 26 Clubs are located in 14 states and in Canada. The Major League Baseball Players Association is an unincorporated association of individuals from most, if not all, the states and many foreign countries. The Players' contracts were negotiated and executed in various states and call for performance at stadiums across the country. The Players' rights of publicity might be violated wherever their performances are broadcast without their consent.

Because we cannot ascertain on the basis of the record before us the state or states whose law governs the Clubs' master-servant claim, we will vacate the district court's opinion and judgment with respect to Count II of the *Baltimore Orioles* complaint and remand this matter for further proceedings. On remand, the district court should determine the appropriate choice-of-law rule under Illinois conflicts law and should make the factual findings necessary to identify the state or states whose law controls.

The district court also should be mindful that the Clubs' master-servant claim is pendent to their copyright claim. "[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *see, e.g., Rodgers v. Lincoln Towing Service*, 771 F.2d 194, 202 (7th Cir. 1985). Whether pendent jurisdiction should be assumed is an issue that "remains open throughout the litigation." *Gibbs*, 383 U.S. at 726. In particular, when the

federal claims are disposed of before trial, the state claims should be dismissed without prejudice almost as a matter of course. *See id.*; *see also, e.g., Graf v. Elgin, Joliet & Eastern Railway Co.*, 790 F.2d 1341, 1344 (7th Cir. 1986); *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604, 611-12 (7th Cir. 1986); *United States v. Zima*, 766 F.2d 1153, 1158 (7th Cir. 1985). Although the federal claims have fallen out of this case so that only state claims remain, rather than deciding ourselves whether to retain pendent jurisdiction, we direct the district court to exercise its discretion in the first instance in light of the above principles. *See Buethe v. Britt Airlines, Inc.*, 749 F.2d 1235, 1242 (7th Cir. 1984) (remanding for exercise of discretion with respect to retention of pendent jurisdiction); *see also Zima*, 766 F.2d at 1159 (citing cases).

III

For the reasons stated above, the district court's judgment is AFFIRMED with respect to the Clubs' copyright claim and is VACATED with respect to the Clubs' master-servant claim and REMANDED for further proceedings consistent with this opinion and law.

A true Copy.
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 82 C 3710

BALTIMORE ORIOLES, INC., et al.,

Plaintiffs,

—v.—

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, a labor organization and an unincorporated association consisting of the Major League Baseball Players,

Defendant.

NO. 82 C 6377

STEPHEN D. ROGERS, et al.,

Plaintiffs,

—v.—

BOWIE K. KUHN, et al.,

Defendants.

MEMORANDUM OPINION

CHARLES P. KOCORAS, *District Judge*:

This matter comes before the Court on plaintiffs Baltimore Orioles, Inc. and others' motion for summary judgment on Counts I and II of the *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n.* (the *Baltimore Orioles* complaint) and for dismissal of the corresponding affirmative defenses raised in *Stephen D. Rogers v. Bowie K. Kuhn* (the *Rogers* complaint).[1] The defendants in the *Baltimore Orioles* complaint have filed a cross-motion for summary judgment on Count I, the copyright claim. For the reasons which follow, the plaintiffs' motion is granted and the defendants' motion is denied.

The Clubs, who conduct the business of Major League Baseball, filed the *Baltimore Orioles* action against the Players Association, a labor organization acting as sole and exclusive bargaining agent for all Major League Baseball Players. The complaint alleges that defendants, on about May 24, 1982, wrote to the Clubs and the television companies the Clubs have telecasting contracts with and informed them that the telecast contracts had been made without "having first obtained the authorization (written or otherwise) of the players performing in the games." The letters further provided that the unauthorized telecasts were unlawful misappropriations of the Player's "property rights in their playing performances." Finally, the letter stated that the Players intended to take steps, including injunctive or monetary relief, to protect their property rights.

Based on these allegations, the plaintiffs seek declaratory and injunctive relief, and now summary judgment, on two legal theories. First, the Clubs assert in Count I that the Players are their employees and as employees produce "works made for hire" within the meaning of 17 U.S.C. § 101. The "works of authorship" are the televised baseball games and the

1. The plaintiffs in the *Baltimore Orioles* complaint are also the defendants in the *Rogers* complaint. The Court will refer to this group of parties as "the Clubs." The defendants in the *Baltimore Orioles* complaint are also the plaintiffs in the *Rogers* complaint. The Court will refer to this group of parties as "the Players."

Clubs, as employers, are the "authors" of the televised games and own the copyrights to them. The Clubs seek a declaration that the telecasts of the games are copyrighted "works made for hire" in which the Players have no rights. On this Count, both parties contend there are no disputed questions of material fact and that the Court should resolve the issue as a matter of law.

In Count II, the Clubs seek a declaration that under the principles of master-servant law, as employers, they own all rights in and to Major League Baseball games, including exclusive rights to perform and show the work publicly, and to license its showing by others. On this count, the Players contend that there are disputed questions of material fact which preclude summary judgment.

Summary judgment shall be granted when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56. The underlying facts and all inferences to be drawn from them must be viewed in the light most favorable to the party opposing the motion. *Fitzsimmons v. Best*, 528 F.2d 692, 694 (7th Cir. 1976). A material issue of fact is one which is outcome determinative under the governing law. *Egger v. Phillips*, 710 F.2d 292, 296 (7th Cir. 1983). Whether there is a disputed question of fact to be presented to the trier of fact is, in the first instance, a question of law for the Court to determine.

I. *Copyright Claims*

In Count I, the Clubs claim that under federal copyright law, they are the copyright owners of the videotaped game telecasts and therefore have all rights in the copyrighted telecasts. The Clubs contend that these rights in the telecasts encompass the work product of the players—their performances. Specifically, the Clubs rely upon the "works made for hire" doctrine to state that as employers they are the exclusive owners of any copyrighted works made by an employee within the scope of his employment, unless the parties "have expressly agreed otherwise in a written instrument." 17 U.S.C. § 201(b).

The Clubs conclude that their federal copyright claims preempt the Players' state claims of publicity rights because those claims are the equivalent of exclusive copyright claims. 17 U.S.C. § 301(a).

The Players attack the Clubs' copyright argument piece by piece. First, they argue that their performances in baseball games are *not* copyrightable "works of authorship" at all and, therefore, cannot form the basis for the "works made for hire" doctrine advanced by the Clubs. They argue, essentially, that the performance of a baseball game is not the sort of work of authorship copyright law protects because it has no creative, aesthetic, or intellectual value. The Players' performances are deemed a non-copyrightable event. Additionally, the Players contend that the "work of authorship" in a game telecast is not the performance of the Players, but the creative skills of the people who capture the performance on tape. Players' Memorandum in Opposition at 110.

The Players also seek to draw a key distinction between two sets of rights which they argue co-exist: the Clubs have the copyright to the telecast of the baseball games and the Players have publicity rights to their likenesses and performances which are embodied in the games' telecasts. The Players contend that the Clubs' ownership of the telecast copyright does not confer on them any rights to the underlying performances. Moreover, the Players characterize the protection afforded the Clubs by their copyright as protection "against third parties" and not as rights against "the performers whose performances are reflected within." Players' Memorandum in Opposition at pp. 111, 112.

Finally, the Players assert that even if the Clubs' copyright argument is applicable, there are questions of fact which must be resolved by the trier of fact. These disputed facts are said to arise from the "express written agreement" exception to the "works made for hire" doctrine. The Players point to contractual provisions and the accompanying bargaining history of the parties as sources of disputed fact.

After careful consideration, this Court is persuaded that the Clubs' copyright claims are controlling. The Players' performances are simultaneously videotaped and broadcast; the 1976

copyright laws provide the Clubs with the telecast copyrights. The telecasts of the performance are "works" which can be copyrighted and the Clubs own those rights. The Players do not dispute this.

The Players do argue, however, that the "evanescent" performance of the Players in a baseball game are not "works of authorship." Rather, the camera operators and others are the persons who create the telecast and copyrightable work. The Players' performances and the camera crew's work in capturing that performance are not so neatly divisible in copyright law. In fact, both these groups contribute to the final product which is copyrighted—the game fixed in tangible form in videotape. The contribution of both sets of employees vest with their *employers*—the Clubs and the telecasters. 1979 Cable Royalty Distribution Proceeding, 49 Fed. Reg. 3899 (1984).

The Players contend that their *live* performances are not works that can be copyrighted. Therefore, the Players seek to separate out their live performances during the game from the end result—the copyrighted videotaped telecast. Their distinction is one without a difference. The Clubs, as employers, have provided the players with a whole process—financing games, scheduling, arranging for stadiums, compensation and benefits—by which the Players, as employees, provide the Clubs with one part of the end result, the game telecast. The Players bargain with their employer and have the right to withhold their performances if they are dissatisfied with the relationship. Their work product—the performances they are paid to display to live and remote audiences—is created at the instance and expense of their employer. The employer has the right to use that product for the very purpose it was created—to sell to the public. 17 U.S.C. § 201(b).

The rights of performance the Players seek to enforce are actually one part of the whole which is the Owners' business production of Major League Baseball games and which are videotaped and copyrighted. The Clubs cannot be said to "own" the players' likenesses or performances and they do not claim to do so. Rather, they claim that their telecast copyright ownership does encompass rights in their employees' perform-

ance which the Players claim as their own. This Court is persuaded that the Clubs' copyright does include the underlying performance of its employees just as a telecast of a live opera performance embodies the performances of the cast members whom the opera company has employed to perform and provided with stage, scenery and costumes.

Moreover, the copyright laws are not limited to protecting the owners of the copyright, the Clubs, from "outsiders." Without doubt, the Clubs are quick to enforce their new 1976 copyright claims against those who would transmit games without authority. But the focus of the "works made for hire" doctrine is squarely upon the employer-employee relationship. Where the employer provides the setting and equipment which permits an employee to perform or use skills to create a "work," the employer seeks protection against the employee who enjoys the employer's benefits, but then uses the product of those benefits as his own. Therefore, the Clubs' copyright *does* provide protection against the Players, the employees.

In fact, the Players, by their efforts to bargain directly with the telecasters, are seeking a right which is "equivalent" to the Clubs' copyright. The Players argue they are simply marketing the right to their likenesses and live performances. The performances, however, only have value to the networks when they are part of the Clubs' entire production of the business of Major League Baseball. The live performances would never take place for the networks to telecast without the employer, the Clubs.

Therefore, the Players seek a right "equivalent" to the Clubs' federal copyright when they seek publicity rights under state law.[2] The Copyright Act preempts state and common law claims in copyrighted works which are "equivalent to any of the exclusive rights" recognized by federal copyright law. 17 U.S.C. § 301(a) (1976). The Players contend that their rights of publicity are not preempted and rely upon *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F. Supp. 1188 (S.D.N.Y. 1983). Such reliance is misplaced. *Bi-Rite* did involve a right of

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2. The Section 50 and 51 claims are discussed *infra* at pp. 12-14 [pp. 42a-44a herein].

publicity distinct from the federal copyright involved in the *Baltimore Orioles* action. In *Bi-Rite*, a famous personality asserted claims against a button-maker for using his well-known likeness without any authority or right. There was no employer-employee relationship and the "right" involved, therefore, did not fall within the "work made for hire" doctrine. That is not the case here because the Clubs have not prevented the Players from their rights to publicity and to protect themselves from those who exploit them *outside* the scope of an employment relationship.

The Players argue that even if copyright law controls, summary judgment is precluded by the presence of questions of material fact. The factual questions are alleged to arise from 17 U.S.C. § 201(b) which provides that:

> In the case of a work made for hire, the employer . . . for whom the work was prepared is considered the author for purposes of this title, and *unless the parties have agreed otherwise in a written instrument signed by them*, owns all of the rights comprised in a copyright. (emphasis added)

The Players described the written contract provisions and the bargaining history of the parties as sources of disputed fact that must be resolved to determine if the parties have expressly agreed otherwise.

The thirty-five year bargaining history between the two parties reflects the demands of each party, but has not created written signed agreements concerning copyrights in telecasts. The Players do not refer specifically to contract provisions which they view as express agreements stating that the Clubs do not own all the rights comprised in the telecast copyright. Elsewhere in the Players brief, they describe "three separate contractual provisions contained in collective bargaining agreements . . . concerning the subject matter of television." Players' Memorandum in Opposition at p. 27. The three provisions—Paragraph 3C of the Uniform Player's Contract, Paragraph 7 of the Benefit Plan, and Article X of the Basic Agreement—reflect a sharp dispute over television and public-

ity rights which both parties agree they may resolve through court actions. The Players argue that the meaning of the contractual provisions are highly disputed. However, none of the three provisions addresses copyright expressly and the Players have stated that they do not contest the Clubs' ownership of the telecast copyright. Players' Memo. in Opposition at pp. 111-113. Therefore, there are not any express written agreements between the parties concerning the Clubs' ownership of the telecast copyright, and consequently, no disputed questions of fact.

The Clubs own the copyright to the game telecasts, which are copyrightable works. The Players performance in the games which are conducted at the Clubs' instance and expense are "works of authorship" and fall within the application of the "works made for hire" doctrine. Therefore, the Clubs have the right to control the use of the game telecasts which preclude the Players from separating out their live performance "rights" as distinct from the telecast rights.

II. *The Master-Servant Law Claim*

In Count II of the *Baltimore Orioles* complaint, the Clubs seek a declaration that under the principles of master-servant law, they, as employers, own the rights in and to the performance of Major League Baseball games. They contend these rights include the rights to perform and show the work publicly and to license its showing by others.

The Players oppose the motion on this count on several grounds and argue that disputed questions of material fact preclude summary judgment. Three arguments are advanced against the master-servant theory: (A) the Players contend that they possess rights of publicity and claims under New York's Civil Rights Laws which are superior to the Clubs' rights in their work product; (B) player publicity and performance rights are typically governed by specific grant of rights clauses in contracts; and (C) the Players have reserved their publicity rights in the game telecasts or, alternatively, whether the Play-

ers have reserved their rights is a disputed question of material fact which precludes summary judgment for the Clubs.

(A) *The Players' Publicity Rights*

The Clubs advance the broad proposition of common law that, absent any express agreement to the contrary, the employer owns the work product which he pays his employees to produce. In this case, the Clubs employ the Players to play baseball. Both parties agree that the Clubs have the right to exploit the final product—the game. Players' Mem. at p. 65. Both also agree that common law doctrines of employer-employee relations apply only in the absence of an agreement to the contrary. Players' Memo. at 87-88.

Although the Players do not contest these general principles, they argue that they possess and have reserved a right of publicity in their name, face, or likeness which is distinct from the Clubs right to control the game—the final product of their employment. Under this reasoning, the Players would have superior rights to broadcast and television rights and revenues. For the Clubs to be able to sell their product to broadcasters, they would first have to gain an express grant from their employees, the Players, to use their name, face, or likeness.

Specifically, the Players make claims to their publicity rights under sections 50 and 51 of the Civil Rights Laws of the State of New York. Section 50 provides, in pertinent part, that a person, firm, or corporation that uses for advertising purposes, or for purposes of trade, the name, portrait or picture of any living person without having first obtained written consent of such person is guilty of a misdemeanor. Section 51 provides for injunctive relief and damages. A primary purpose of the statute's provisions is to protect the individual from the selfish commercial exploitation of his personality. *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952). The provision codifies the tort of the misappropriation of one's name, face, or likeness for commercial advantage.

In this case, however, the Court finds that the Clubs' use of the Players names, likenesses, and performances is not an

unauthorized exploitation of them without their knowledge or consent. Rather, the Clubs exploitation of the Players' game performances constitutes the use of a work product which the Players, as employees, produced for the Clubs, their employers. This finding rests on the nature of the performance being exploited and the Players' awareness of the use of their performances by the Clubs.

First, the Players, by entering into a contract with the Clubs have agreed to render baseball performances in exchange for a salary and other benefits. These services can only have value when the Clubs schedule and orchestrate these performances into games to be presented to an audience—either live or remote. Therefore, by agreeing to perform the service of playing baseball, the Players consent or agree to provide the Clubs with the work product of a public performance.

The Players present case law, however, to argue that even within the employer-employee relationship, an employee may assert publicity rights against his employer. The cases cited do not describe settings where an employer seeks to use the very "product" the employee was hired to create. In *Martin*, *Johnson*, and *Caesar*, the employer exploited the employee's face or likeness to sell the employer's product. *Martin v. Senators Inc.*, 220 Tenn. 465, 418 S.W.2d 660 (1967) 660 (1967) (finding employer's use of employee photograph in newspaper advertisement did not state a claim); *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953) (finding implied consent on part of employee who posed in picture of employer's product); *Caesar v. Chemical Bank*, 118 Misc. 2d 118, 460 N.Y.S.2d 235 (Sup. Ct. 1983) (finding a claim where employees never knew the purpose of employer's photographing them). In no case did the employee preserve rights in a product which the employer hired him to create. An employer's use of an employee's work product which he was hired to render does not constitute misappropriation of the employee's rights in the product.

Second, the Players were aware when they agreed to render performances to the Clubs that they would be performing in front of live audiences in the ball park and that their performances would be described on radio broadcasts and recorded and broadcast on television. This knowledge is another reason why the Clubs' use of the performance is not misappropriation. When a performer, whether serving an employer or not, performs with the knowledge that his performance is being recorded, he fails to state a claim for misappropriation. *See, e.g., Long v. Decca Records, Inc.*, 76 N.Y.S.2d 133 (Sup. Ct. N.Y. Co. 1947). Sports performers and entertainers who perform in public must act affirmatively to protect interests in the recordings, telecasts, or other rights which others may derive from their public performances. In this case, the Players do not dispute that they are acutely aware of the telecasting of their performances and of the substantial revenues which the Clubs enjoy from the telecasts. *See, e.g.*, Jackson deposition, Ex. 20 at 43-44.

Therefore, by the very nature of the work product, a public sporting event, and by the employee's knowledge of the employer's broadcast of the product, the Players have no claims of publicity to be asserted at common law or under New York statute.[3]

(B) *Publicity Rights In Other Major Sports*

The Players urge the Court to look to other major sports leagues to examine the arrangements reached over television rights in name, likeness, and performances. Based on their survey of other contractual arrangements, the Players argue that television or publicity rights involve "the use of specific grant of rights clauses." The Players interpret these contractual arrangements as the performers' granting of their publicity rights to the Clubs or owners for a particular time or purpose.

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3. The only remaining claim the Players can rely on is that they have expressly reserved rights in the telecasts. This issue is addressed later in this opinion at pp. 17-21 [pp. 46a-49a herein].

This survey, however, is more accurately described as one of the contractual results different performers and their employers have reached through negotiation and hard bargaining. The contracts do not reflect an understanding that the players possess all rights in their public performance and the only rights the employer possesses are those the player or performer specifically grants to him. Moreover, because the different arrangements arise from bargaining and compromise, they are not particularly analogous to the baseball Players and Clubs situation nor can they create rules of law which bind the Clubs or the Players.

In the National Football League, the Player's Contract provides a publicity clause which permits the Club and League to use the player's name and picture for publicity and promotional purposes. Clubs Appendix, Ex. 45. There is no mention of the use of name and picture during game telecasts. A district court judge interpreting that contract found that one basis for team members' consent to the use of their name and likeness in game telecasts was simply their participation in the televised games. *National Football League, Inc. v. The Alley, Inc., et al.*, Slip Op., No. 83-0701-CIV-JWK (S.D. Fla. Dec. 29, 1983).

The North American Soccer League has a collective bargaining agreement with an Article XV, titled "Television Rights." The article states, "should the North American Soccer League obtain television revenues exceeding an annual average of $500,000 per club, the Collective Bargaining Agreement may, at the Union's option, be reopened for bargaining for more benefits. If it is re-opened, the Union shall have the right to strike after bargaining." Collective Bargaining Agreement Between North American Soccer League Players Association and North American Soccer League, Players' Ex. 14. Again, this clause simply demonstrates that television revenues are large, that below a certain television revenue level, the amount agreed on is firm, but the Players may wish to *bargain* again or strike after reopening talks when the revenues exceed $500,000 per club. This provision draws lines and involves bargaining tools and strategies; it does not create a grant of television rights from the Players to the Clubs. It leaves the television revenues

as an item to be bargained over along with other terms and conditions of employment.

The other examples follow a similar pattern and do not further the Players' argument. The Clubs and employers may rely on their rights as employers to their employees' work product. The Clubs reap huge revenues from this product and the Players, like any other employees, bargain with their employer for larger compensation, for a larger piece of the ball park gate, television revenue, cable revenue, and other future revenues. In some sports, the performers or players may have been more successful or less successful than the baseball players in gaining a share of television or other revenues. This success or failure to receive television *revenues* cannot create publicity or television *rights* in the Players.

(C) *Players' Reservation of Publicity Rights*

The parties agree, in principle, that their employer-employee relationship is governed by common law doctrine, but only in the absence of an agreement to the contrary. Players' Mem. at 88. Therefore, under common law, the employer would control the employee's work product. Here, however, the Players argue that the Uniform Player's Contract, the Basic Agreement and Benefit Plan and the parties' collective bargaining history supercede the rules of common law. The Players maintain that by their contract they have limited the Clubs' use of their pictures and performances and have reserved their publicity rights specifically as to television. Alternatively, the Players argue that because the meaning of the collective bargaining agreements is disputed, there is a disputed material question of fact which precludes summary judgment in the Clubs favor.

The Court finds that the Players have not reserved any television rights through their agreements and that the meaning of the agreements does not create a disputed question of fact. The Players cite four sources for the reservation of their television rights: Paragraph 3C of the Uniform Player's contract; Paragraph 7 of the Benefit Plan and Article X of the

Basic Agreement; the collective bargaining history; and the industry practice of funding the pension fund through television revenues.

Paragraph 3C of the Uniform Player's Contract provides, in pertinent part, "The Player agrees that his picture may be taken for still photographs, motion pictures or television at such times as the Club may designate and that all rights in such pictures shall belong to the Club and may be used by the Club for publicity purposes it desires." The Clubs attempt to argue, in Count III of the *Baltimore Orioles* complaint, that this provision affirms their common law rights to ownerships of the game telecasts. The Players contend it means that the Players agree to the use of their pictures only for promotional or advertising purposes, but not for telecasting. The validity of either of these interpretations is not before the court now. The only question to be directed at paragraph 3C at this time is whether it is an express agreement between the parties that the Players possess and retain all television and telecast rights in their pictures and performances.

The plain meaning of the paragraph does not expressly or impliedly reserve to the Players rights in the game telecasts. For the purposes of this motion, the parties agree the provision at least means that the Club can use the Player's picture to promote attendance and interest in major league baseball. The provision does not imply that by the act of agreeing to the Clubs' use of their picture for promotional purposes, the Players and Clubs have agreed that the Players have reserved all rights to their pictures and performances in television broadcasts and that such agreement between them supercedes common law doctrines. The meaning of paragraph 3C is plain and unambiguous when determining whether it constitutes a contractual agreement that the Players' television rights are reserved; it does not create such a reservation. In addressing the issue of a reservation, there are no ambiguities in paragraph 3C which must await trial to be resolved.

The Players also rely upon paragraph 7 of the Benefit Plan and Article X of the Basic Agreement as constituting a reserva-

tion of television rights. Paragraph 7 of the Players Benefit Plan states:

> The execution of this Agreement shall not be deemed to change any rights or obligations of the Clubs or the players with respect to the funding of the Plan (except to the extent set forth in other Paragraphs of this Agreement) or with respect to radio and television, as such rights and obligations existed immediately after the execution of the Agreement Re Major League Baseball Players Benefit Plan of January 1, 1967.

The relevant portion of Article X of the Basic Agreement provides:

> Anything in the Grievance Procedure provided for in Basic Agreement to the contrary notwithstanding complaints or disputes as to any rights of the Players or the Clubs with respect to the sale or proceeds of sale of radio or television broadcasting rights in any baseball games by any kind of method of transmission, dissemination or reception shall not be subject to said Grievance Procedure. However, nothing herein or in the Grievance Procedure shall alter or abridge the rights of the Parties, or any of them, to resort to a court of law for the resolution of such complaint or dispute.

Again, the plain meaning of both provisions fails to provide the Players with a reservation of their rights in the telecasts. The provisions seek to either preserve the *status quo* of the Benefit Plan funding and whatever rights and obligations already existed in radio and television or to preserve each party's right to have disputes over radio and television rights resolved in court and not through the Grievance Procedure. Neither provision presents any ambiguity which must await trial.

The Players urge the court, however, to read these provisions in conjunction with the bargaining history between the parties. Where the meaning of contract provisions are clear, there is no need to resort to extrinsic evidence of the parties' negotiations

and strategies. The bargaining history and each party's posture and declaration of what are its "rights" do not create those rights. The rights either exist or do not exist. The bargaining history and the funding of the Players' pension through television revenue reflect the parties' on-going struggles to agree on how to divide the huge profits which flow from major league baseball. The Clubs could decide to fund the pension through another source of revenue or eliminate the pension; the Players could refuse to play in all televised games or boycott the All Star Game. In either case, the parties' actions, apart from what they agree to bind themselves to under their collective bargaining agreement, do not define their legal rights.

For these reasons, the plaintiffs' motion for summary judgment on Count I, the copyright claim and Count II, the master-servant claim is granted. The Clubs own the copyright of the game telecasts, which necessarily incorporate the pictures and performances of the Players. As employers, the Clubs retain all rights to their employees' work product and as of yet have not agreed to the contrary. The parties are left to their bargaining strategies to resolve how much major league baseball revenue, from whatever source derived, shall remain with the Clubs and how much shall be traded to the Players in exchange for their skilled performances.

/s/ CHARLES P. KOCORAS
Charles P. Kocoras
United States District Judge

Dated: May 23, 1985

APPENDIX C

Judgments of the District Court

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

Northern District of Illinois

Nos. 82 C 3710 & 82 C 6377

BALTIMORE ORIOLES, INC., et al.

—v.—

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION

STEPHEN D. ROGERS, et al.

—v.—

BOWIE K. KUHN, et al.

UNITED STATES DISTRICT JUDGE
CHARLES P. KOCORAS

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding.

The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiffs and against the defendants.

H. Stuart Cunningham
Clerk

(BY) /S/_____
Deputy Clerk

May 23, 1985

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 82 C 3710

BALTIMORE ORIOLES, INC., et al.,

Plaintiffs,

—v.—

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Defendant.

NO. 82 C 6377

STEPHEN D. ROGERS, et al.,

Plaintiffs,

—v.—

BOWIE K. KUHN, et al.,

Defendants.

JUDGE CHARLES P. KOCORAS

AMENDED JUDGMENT ORDER

Plaintiffs, the Major League Professional Baseball Clubs (the "Clubs"), having moved to amend this Court's Judgment Order, nunc pro tunc to the date of its entry on May 23, 1985, as amended May 31, 1985, the defendants having no objection and the Court having heard the arguments of counsel and being fully advised in the premises:

IT IS ORDERED that the Clubs' Motion is granted and the Order of this Court dated May 23, 1985, as amended May 31, 1985, is hereby amended as follows:

The motion by plaintiffs in the *Baltimore Orioles* action for summary judgment on Count I, the copyright claim and Count II, the master-servant claim is granted. Counts III and IV of the *Baltimore Orioles* complaint are therefore dismissed as moot, and defendants' counterclaims in the *Baltimore Orioles* action are dismissed. Accordingly, judgment is entered in favor of the plaintiffs and against the defendant in the *Baltimore Orioles* action. The *Stephen D. Rogers* complaint is dismissed and judgment is entered in favor of the defendants and against the plaintiffs in said action.

IT IS FURTHER ORDERED that this amended final judgment supersedes the judgment entered on May 23, 1985, as amended May 31, 1985 and shall be deemed to be effective nunc pro tunc.

ENTERED:

/S/ Charles P. Kocoras

UNITED STATES DISTRICT JUDGE

DATED: January 27, 1986

APPENDIX D

Judgment of the Court of Appeals

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

October 29, 1986

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

No. 85-2020

BALTIMORE ORIOLES, INC., et al.,

Plaintiffs-Appellees,

—vs.—

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, a labor organization and an unincorporated association consisting of the Major League Baseball Players,

Defendant-Appellant,

STEPHEN D. ROGERS, et al.,

Plaintiffs-Appellants,

—VS.—

BOWIE K. KUHN, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
Nos. 82 C 3710 & 82 C 6377

Charles P. Kocoras, *Judge*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED IN PART, VACATED IN PART, and REMANDED, in accordance with the opinion of this Court filed this date. Each side is to bear its own costs on appeal.

APPENDIX E

The 1976 Copyright Act, 17 U.S.C. § 101 *et seq.* (Excerpts)

§ 101. Definitions

As used in this title, the following terms and their variant forms mean the following:

. . .

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

. . .

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment,

condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

. . .

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

. . .

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

. . .

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public per-

formance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

. . .

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for

publication and with the purpose of use in systematic instructional activities.

Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2541, *as amended by* Pub.L. 96-517, § 10(a), Dec. 12, 1980, 94 Stat. 3028.

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works; and

(7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2544.

§ 103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright

subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2545.

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2546.

§ 201. Ownership of copyright

(a) **Initial Ownership.**—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.

(b) **Works Made for Hire.**—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright. . . .

Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2568, *as amended by* Pub.L. 95-598, Title III, § 313, Nov. 6, 1978, 92 Stat. 2676.

§ 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2572.

APPENDIX F

State Statutes Incorporating Rights of Publicity

California Civil Code Annotated § 3344 (West Supp. 1987)

§ 3344. Use of another's name, voice, signature, photograph, or likeness for advertising or selling or soliciting purposes

(a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

(b) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.

(1) A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in

the photograph is the same person who is complaining of its unauthorized use.

(2) If the photograph includes more than one person so identifiable, then the person or persons complaining of the use shall be represented as individuals rather than solely as members of a definable group represented in the photograph. A definable group includes, but is not limited to, the following examples: a crowd at any sporting event, a crowd in any street or public building, the audience at any theatrical or stage production, a glee club, or a baseball team.

(3) A person or persons shall be considered to be represented as members of a definable group if they are represented in the photograph solely as a result of being present at the time the photograph was taken and have not been singled out as individuals in any manner.

(c) Where a photograph or likeness of an employee of the person using the photograph or likeness appearing in the advertisement or other publication prepared by or in behalf of the user is only incidental, and not essential, to the purpose of the publication in which it appears, there shall arise a rebuttable presumption affecting the burden of producing evidence that the failure to obtain the consent of the employee was not a knowing use of the employee's photograph or likeness.

(d) For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).

(e) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the

commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

(f) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that such owners or employees had knowledge of the unauthorized use of the person's name, voice, signature, photograph, or likeness as prohibited by this section.

(g) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

Florida Statutes Annotated § 540.08 (West 1982)

540.08 Unauthorized publication of name or likeness

(1) No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph or other likeness of any natural person without the express written or oral consent to such use given by:

(a) Such person; or

(b) Any other person, firm or corporation authorized in writing by such person to license the commercial use of his name or likeness; or

(c) If such person is deceased, any person, firm or corporation authorized in writing to license the commercial use of his name or likeness, or if no person, firm or corporation is so authorized, then by any one from among a class composed of his surviving spouse and surviving children.

(2) In the event the consent required in subsection (1) is not obtained, the person whose name, portrait, photograph, or

other likeness is so used, or any person, firm or corporation authorized by such person in writing to license the commercial use of his name or likeness, or, if the person whose likeness is used is deceased, any person, firm or corporation having the right to give such consent, as provided hereinabove, may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

(3) The provisions of this section shall not apply to:

(a) The publication, printing, display or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes;

(b) The use of such name, portrait, photograph or other likeness in connection with the resale or other distribution of literary, musical or artistic productions or other articles of merchandise or property where such person has consented to the use of his name, portrait, photograph or likeness on or in connection with the initial sale or distribution thereof; or

(c) Any photograph of a person solely as a member of the public and where such person is not named or otherwise identified in or in connection with the use of such photograph.

(4) No action shall be brought under this section by reason of any publication, printing, display or other public use of the name or likeness of a person occurring after the expiration of forty years from and after the death of such person.

(5) As used in this section, a person's "surviving spouse" is the person's surviving spouse under the law of his domicile at the time of his death, whether or not the spouse has later remarried; and a person's "children" are his immediate offspring and any children legally adopted by him. Any consent

provided for in subsection (1) shall be given on behalf of a minor by the guardian of his person or by either parent.

(6) The remedies provided for in this section shall be in addition to and not in limitation of the remedies and rights of any person under the common law against the invasion of his privacy.

Massachusetts General Laws Annotated
Ch. 214 § 3A (West Supp. 1986)

§ 3A. Unauthorized use of name, portrait or picture of a person; injunctive relief; damages; exceptions

Any person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action in the superior court against the person so using his name, portrait or picture, to prevent and restrain the use thereof; and may recover damages for any injuries sustained by reason of such use. If the defendant shall have knowingly used such person's name, portrait or picture in such manner as is prohibited or unlawful, the court, in its discretion, may award the plaintiff treble the amount of the damages sustained by him. Nothing in this section shall be so construed as to prevent any person practicing the profession of photography from exhibiting in or about his or its establishment specimens of the work of such person or establishment, unless the exhibiting of any such specimen is continued after written notice objecting thereto has been given by the person portrayed; and nothing in this section shall be so construed as to prevent any person from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by such manufacturer or dealer which such person has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with any literary, musical or artistic production of such author, composer or

artist which such person has sold or disposed of with such name, portrait or picture used in connection therewith.

Revised Statutes of Nebraska
§§ 20-202, -205, -206 to -208 (1983)

20-202. Invasion of privacy; exploitation of a person for advertising or commercial purposes; situations; not applicable. Any person, firm, or corporation that exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes shall be liable for invasion of privacy. The provisions of this section shall not apply to:

(1) The publication, printing, display, or use of the name or likeness of any person in any printed, broadcast, telecast, or other news medium or publication as part of any bona fide news report or presentation or noncommercial advertisement having a current or historical public interest and when such name or likeness is not used for commercial advertising purposes;

(2) The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property when such person has consented to the use of his or her name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof so long as such use does not differ materially in kind, extent, or duration from that authorized by the consent as fairly construed; or

(3) Any photograph of a person solely as a member of the public when such person is not named or otherwise identified in or in connection with the use of such photograph.

20-205. Publication or intrusion; not actionable; when. Any publication or intrusion otherwise actionable under section 20-202, 20-203, or 20-204 shall be justified and not actionable under sections 20-201 to 20-211 and 25-840.01 [libel; invasion

of privacy; retraction] if the subject of such publication or intrusion expressly or by implication consents to the publicity or intrusion so long as such publication or intrusion does not differ materially in kind, extent, or duration from that implicitly or expressly authorized by the consent as fairly construed. If such person is a minor, such consent may be given by a parent or guardian. If the subject of the alleged invasion of privacy is deceased, such consent may be given by the surviving spouse, if any, or by the personal representative.

20-206. Right of privacy; defenses and privileges. In addition to any defenses and privileges created in sections 20-201 to 20-211 and 25-840.01, the statutory right of privacy created in sections 20-201 to 20-211 and 25-840.01 shall be subject to the following defenses and privileges:

(1) All applicable federal and Nebraska statutory and constitutional defenses;

(2) As to communications alleged to constitute an invasion of privacy, the defense that the communication was made under circumstances that would give rise to an applicable qualified or absolute privilege according to the law of defamation; and

(3) All applicable, qualified, and absolute privileges and defenses in the common law of privacy in this state and other states.

20-207. Invasion of privacy; action; nonassignable. The action for invasion of privacy created by sections 20-201 to 20-211 and 25-840.01 shall be personal to the subject of the invasion and shall in no case be assignable.

20-208. Invasion of privacy; right; not survive death; exception. The right of action for invasion of privacy created by sections 20-201 to 20-211 and 25-840.01, with the single exception of the action arising out of exploitation of a person's name or likeness in section 20-202, shall not be deemed to

survive the death of the subject of any such invasion of privacy.

New York Civil Rights Law §§ 50-51
(McKinney 1976 & Supp. 1987)

§ 50. Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. Action for injunction and for damages

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. But nothing contained in this article shall be so construed as to prevent any person, firm or corporation from selling or otherwise transferring any material containing such name, portrait or picture in whatever medium to any user of such name, portrait or picture, or to any third party for sale or transfer directly or indirectly to such a user, for use in a manner lawful under this article; nothing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting

thereto has been given by the person portrayed; and nothing contained in this article shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

Oklahoma Statutes Annotated §§ 839.1-.3 (West 1983)

§ 839.1. Right of privacy—Use of name or picture for advertising without consent—Misdemeanor

Any person, firm or corporation that uses for the purpose of advertising for the sale of any goods, wares or merchandise, or for the solicitation of patronage by any business enterprise, the name, portrait or picture of any person, without having obtained, prior or subsequent to such use, the consent of such person, or, if such person is a minor, the consent of a parent or guardian, and, if such person is deceased, without the consent of the surviving spouse, personal representatives, or that of a majority of the deceased's adult heirs, is guilty of a misdemeanor.

§ 839.2. Right of action—Damages

Any person whose right of privacy, as created in Section 1 hereof, is violated or the surviving spouse, personal representatives or a majority of the adult heirs of a deceased person whose name, portrait, or picture is used in violation of Section 1 hereof, may maintain an action against the person, firm or corporation so using such person's name, portrait or picture to prevent and restrain the use thereof, and may in the same action recover damages for any injuries sustained, and if the

defendant in such action shall have knowingly used such person's name, portrait or picture in such manner as is declared to be unlawful, the jury or court, if tried without a jury, in its discretion may award exemplary damages.

§ 839.3. Right of photographer to exhibit specimens of work—Other uses excepted

Nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith. Provided that this act shall not prevent the continued use of names of such persons by business establishments using such names and displaying such names at the effective date of this act.

General Laws of Rhode Island § 9-1-28.1 (1985)

9-1-28.1. Right to privacy—Action for deprivation of right. —(a) *Right to Privacy Created.*—It is the policy of this state that every person in this state shall have a right to privacy which shall be defined to include any of the following rights individually:

. . .

(2) The right to be secure from an appropriation of one's name or likeness;

(A) In order to recover for violation of this right, it must be established that:

(i) The act was done without permission of the claimant;

(ii) The act is of a benefit to someone other than the claimant;

(B) It need not be established that there was any publication.

. . .

(b) *Right of Action.*—Every person who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to a deprivation and/or violation of his right to privacy shall be liable to the party injured in an action at law, suit in equity or any other appropriate proceedings for redress in either the superior court or district court of this state. The court having jurisdiction of an action brought pursuant to this section may award reasonable attorneys' fees and court costs to the prevailing party. . . .

Tennessee Code Annotated
§§ 47-25-1102 to -1107 (1984)

47-25-1102. Definitions.—As used in this part, unless the context otherwise requires:

(1) "Definable group" means an assemblage of individuals existing or brought together with or without interrelation, orderly form or arrangement, including but not limited to, a crowd at any sporting event, a crowd in any street or public building, the audience at any theatrical or stage production, a glee club, or a baseball team;

(2) "Individual" means human being, living or dead;

(3) "Likeness" means the use of an image of an individual for commercial purposes;

(4) "Person" means any firm, association, partnership, corporation, joint stock company, syndicate, receiver, common law trust, conservator, statutory trust or any other concern by whatever name known or however organized, formed or created, and includes not-for-profit corporations, associations, educational and religious institutions, political parties, community, civic or other organizations; and

(5) "Photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any individual, so that the individual is readily identifiable.

47-25-1103. Property right in use of name, photograph, likeness.—(a) Every individual has a property right in the use of his name, photograph or likeness in any medium in any manner.

(b) The individual rights provided for in subsection (a) shall constitute property rights and shall be freely assignable and licensable, and shall not expire upon the death of the individual so protected, whether or not such rights were commercially exploited by the individual during the individual's lifetime, but shall be descendible to the executors, assigns, heirs, or devisees of the individual so protected by this part.

47-25-1104. Exclusivity and duration of right.—(a) The rights provided for in this part shall be deemed exclusive to the individual, subject to the assignment or licensing of such rights as provided in § 47-25-1103, during such individual's lifetime and to the executors, heirs, assigns or devisees for a period of ten (10) years after the death of the individual.

(b)(1) Commercial exploitation of the property right by any executor, assignee, heir, or devisee if the individual is deceased shall maintain the right as his exclusive property until such right is terminated as provided in this subsection (b).

(2) The exclusive right to commercial exploitation of the property rights is terminated by proof of the non-use of the

name, likeness, or image of any individual for commercial purposes by an executor, assignee, heir or devisee to such use for a period of two (2) years subsequent to the initial ten (10) year period following the individual's death.

47-25-1105. Unauthorized use prohibited.—(a) Any person who knowingly uses or infringes upon the use of another individual's name, photograph, or likeness in any medium, in any manner directed to any person other than such individual, as an item of commerce for purposes of advertising products, merchandise, goods or services, or for purposes of fund raising, solicitation of donations, purchases of products, merchandise, goods or services, without such individual's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, or in the case of a deceased individual, the consent of the executor or administrator, heirs or devisees of such deceased individual, shall be liable to a civil action.

(b) It shall be no defense to the unauthorized use defined in subsection (a) that the photograph includes more than one individual so identifiable; provided that the individual or individuals complaining of the use shall be represented as individuals per se rather than solely as members of a definable group represented in the photograph.

47-25-1106. Remedies.—(a) The chancery and circuit court having jurisdiction for any action arising pursuant to this part may grant injunctions on such terms as it may deem reasonable to prevent or restrain the unauthorized use of an individual's name, photograph or likeness.

(b) At any time while an action under this part is pending, the court may order the impounding, on such terms as it may deem reasonable, of all materials or any part thereof claimed to have been made or used in violation of the individual's rights, and such court may enjoin the use of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such materials may be reproduced.

(c) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all materials found to have been made or used in violation of the individual's rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such materials may be reproduced.

(d) An individual is entitled to recover the actual damages suffered as a result of the knowing use or infringement of such individual's rights and any profits that are attributable to such use or infringement which are not taken into account in computing the actual damages. Profit or lack thereof by the unauthorized use or infringement of an individual's rights shall not be a criteria of determining liability.

(e) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

47-25-1107. Exemptions.—(a) It shall be deemed a fair use and no violation of an individual's rights shall be found, for purposes of this part, if the use of a name, photograph or likeness is in connection with any news, public affairs, or sports broadcast or account.

(b) The use of a name, photograph or likeness in a commercial medium shall not constitute a use for purposes of advertising or solicitation solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the complainant individual's name, photograph or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for purposes of advertising or solicitation.

(c) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television stations, billboards, and transit ads, who have published or disseminated any advertisement or solicitation in violation of this part unless it is established that such owners or employees

had knowledge of the unauthorized use of the individual's name, photograph, or likeness as prohibited by this section.

Utah Code Annotated §§ 45-3-1 to -6 (1981)

45-3-1. Short title. This act shall be known and may be cited as the "Abuse of Personal Identity Act."

45-3-2. Definitions. As used in this act:

(1) "Person" means any natural person, firm, partnership, association, corporation, joint venture, or any other form of business organization or arrangement, and the agents or representatives of such persons.

(2) "Individual" means a natural person.

(3) "Publish" means that a person provides the instrumentality through which an advertisement is communicated to the public at large or to a significant portion thereof.

(4) "Cause the publication" means that a person, prepares or requests another to prepare an advertisement of the type described in section 45-3-3(1), and that person submits or requests another to submit the advertisement to a publisher, and the advertisement has been published.

(5) "Personal identity" means an individual's name, title, picture, or portrait.

45-3-3. Acts constituting abuse. The personal identity of an individual is abused if:

(1) An advertisement is published in which the personal identity of that individual is used in a manner which expresses or implies that the individual approves, endorses, has endorsed, or will endorse the specific subject matter of the advertisement; and

(2) Consent has not been obtained for such use from the individual, or if the individual is a minor, then consent of one

of the minor's parents or consent of the minor's legally appointed guardian.

45-3-4. Cause of action for abuse—Remedies. An individual whose personal identity has been abused under section 45-3-3 of this act may bring an action against a person who caused the publication of the advertisement, and is entitled to injunctive relief, damages alleged and proved, exemplary damages, and reasonable attorney's fees and costs.

45-3-5. Action against publisher—Grounds—Remedies.

(1) An individual whose personal identity has been abused under section 45-3-3 of this act may bring an action against a person who published the advertisement:

(a) If the advertisement, on its face is such that a reasonable person would conclude that it is unlikely that an individual would consent to such use; and

(b) The publisher did not take reasonable steps to assure that consent was obtained.

(2) In an action under this section, the plaintiff shall be entitled to injunctive relief, damages alleged and proved, exemplary damages, and reasonable attorney's fees and costs.

45-3-6. Other remedies unaffected. This act does not limit or supercede any causes of action otherwise available to the parties.

Code of Virginia
§§ 8.01-40 (1984), 18.2-216.1 (1982)

§ 8.01-40. Unauthorized use of name or picture of any person; exemplary damages; statute of limitations.—

A. Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her

parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.

B. No action shall be commenced under this section more than twenty years after the death of such person.

§ **18.2-216.1. Unauthorized use of name or picture of any person; punishment.**—A person, firm, or corporation that knowingly uses for advertising purposes, or for the purpose of trade, the name, portrait, or picture of any person resident in the State, without having first obtained the written consent of such person, or if dead, of his surviving consort, or if none, his next of kin, or, if a minor, of his or her parent or guardian, as well as that of such minor, shall be deemed guilty of a misdemeanor and be fined not less than $50 nor more than $1,000.

Wisconsin Statutes Annotated § 895.50 (West 1983)

895.50. Right of privacy

(1) The right of privacy is recognized in this state. One whose privacy is unreasonably invaded is entitled to the following relief:

(a) Equitable relief to prevent and restrain such invasion, excluding prior restraint against constitutionally protected communication privately and through the public media;

(b) Compensatory damages based either on plaintiff's loss or defendant's unjust enrichment; and

(c) A reasonable amount for attorney fees.

(2) In this section, "invasion of privacy" means any of the following:

. . .

(b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.

. . .

(3) The right of privacy recognized in this section shall be interpreted in accordance with the developing common law of privacy, including defenses of absolute and qualified privilege, with due regard for maintaining freedom of communication, privately and through the public media.

. . .

(6)(a) If judgment is entered in favor of the defendant in an action for invasion of privacy, the court shall determine if the action was frivolous. If the court determines that the action was frivolous, it shall award the defendant reasonable fees and costs relating to the defense of the action.

(b) In order to find an action for invasion of privacy to be frivolous under par. (a), the court must find either of the following:

1. The action was commenced in bad faith or for harassment purposes.

2. The action was devoid of arguable basis in law or equity.

(7) No action for invasion of privacy may be maintained under this section if the claim is based on an act which is permissible under ss. 968.27 to 968.33 [interception of communications].

No. 86-1260

Supreme Court, U.S.
FILED
FEB 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Petitioner,

—v.—

BALTIMORE ORIOLES, INC., ET AL.,

Respondents.

STEPHEN D. ROGERS, ET AL.,

Petitioners,

—v.—

BOWIE K. KUHN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

LOUIS L. HOYNES, JR.
Counsel of Record

ROBERT J. KHEEL
LAWRENCE O. KAMIN
JOHN R. OLLER
Willkie Farr & Gallagher
One Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 935-8000

DONALD E. EGAN
LEE ANN WATSON
Katten, Muchin, Zavis,
Pearl, Greenberger & Galler
525 West Monroe Street
Chicago, Illinois 60606
(312) 902-5200

JAMES P. GARNER
GEORGE DOWNING
Baker & Hostetler
3200 National City Center
Cleveland, Ohio 44114
(216) 621-0200

Attorneys for Respondents

QUESTION PRESENTED

Whether the Copyright Act of 1976 preempts the claims of professional baseball players to control the exhibition of copyrighted telecasts of Major League Baseball games in which the players are employed to perform, where the game telecasts are "works made for hire" owned by the Club employers under federal copyright law.

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IN THE

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OCTOBER TERM, 1986

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MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to petitioners' request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on October 29, 1986.[1]

1 The listing of all parent companies, subsidiaries and affiliates of any of the corporate respondents, pursuant to Rule 28.1 of the Court, is set forth in the Appendix hereto.

STATEMENT OF THE CASE

This case presents the question of who has the right to control the telecasts of Major League Baseball games and the revenues which flow therefrom—the Major League Baseball Clubs (the "Clubs") who produce the games and copyright the telecasts, or the baseball players (the "Players") whom the Clubs employ to perform in the games. The case arises out of a longstanding collective bargaining dispute between the Clubs and the Players' collective bargaining representative, the Major League Baseball Players Association, concerning the Players' demands for greater levels of compensation, particularly pension benefits. In past years, the Players from time to time asserted in collective bargaining that they had certain "property rights" in their game performances as televised. The Clubs consistently denied this assertion, and routinely telecast Major League Baseball games for approximately 40 years without protest or interference from the Players. In May, 1982, however, the Players Association brought the issue to the fore by sending letters to the Clubs and certain television networks and stations asserting that the game telecasts violated the Players' alleged property rights in their names, likenesses and performances and that the Players were prepared to bring suit to enforce those rights.

As the court of appeals observed, the mailing of these letters "led the parties to move their dispute from the bargaining table to the courtroom." Pet. App. at 2a.[2] There, in the words of the court of appeals, the Players sought a "judicial declaration that they possess a right—the right to control the telecasts of major league baseball games—that they could not procure in bargaining with the Clubs." Pet. App. at 28a. Thus, it is evident that this case involves essentially a labor dispute over money and bargaining power—a dispute which the Players now seek to transform and elevate into a legal question of great

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2 References to the petitioners' appendix are identified herein as "Pet. App. at ____."

public moment. As will be shown below, the case was correctly decided by the court of appeals and presents no issues of genuine significance beyond the interests of the parties in their collective bargaining relationship.[3]

1. The District Court Proceedings. When the Players' May, 1982 letters threatened interference with the Clubs' long-standing telecasting rights, the Clubs filed a declaratory judgment action in the district court to confirm that they have complete ownership of the rights with respect to the telecasts of Major League Baseball games. After the close of discovery, the Clubs moved for summary judgment on two of the counts of their complaint, the first based on federal copyright law, and the second based on master-servant common law.[4] The district court found that discovery had failed to reveal any genuine issues of material fact and that the Clubs were entitled to judgment as a matter of law on both the master-servant and copyright counts.

With respect to the master-servant count, the district court found that the Clubs own the exclusive right to market the Players' performances in games as the work product of their employment, and that the Clubs may therefore exhibit or license the exhibition of those performances to live or remote audiences. Pet. App. at 41a-44a.

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3 Rather than respond in this brief to the Players' various mischaracterizations of the bargaining history of the parties, the Clubs refer the Court to the opinions of the courts below, which fully address the Players' factual contentions. Suffice to say here that both the district court and the court of appeals found that the so-called bargaining "history" relied upon by the Players had no bearing on the copyright issue now presented for review. *See* Pet. App. at 12a-17a, 40a-41a.

4 The Clubs' complaint included two additional counts based, respectively, upon the contract between the parties and the doctrines of waiver and estoppel. The Clubs did not seek summary judgment on these counts because they involve, by their nature, questions of contract interpretation and issues of fact which may be disputed.

The district court also found that by virtue of this same well-settled common-law principle, codified as the "works made for hire" doctrine in the Copyright Act of 1976 ("the Copyright Act," "the 1976 Act," or "the Act"), the Clubs own the right to market the copyrighted telecasts of Major League Baseball games, including the Players' performances as incorporated therein. The district court further determined that the Players, by asserting the right to control the telecasts of the games, were asserting rights "equivalent" to copyright and that the Players' claims were thus preempted by the Copyright Act. Pet. App. at 36a-41a. The district court concluded its opinion by stating that the parties were "left to their bargaining strategies" to resolve how much Major League Baseball revenue, from whatever source derived, should remain with the Clubs and how much should be traded to the Players in exchange for their game performances. Pet. App. at 49a.

2. The Court of Appeals Proceedings. On appeal, the Seventh Circuit affirmed the district court's finding that there were no issues of fact precluding summary judgment, and affirmed that the Clubs were entitled to judgment on the copyright count. The court of appeals found that the game telecasts were copyrightable "works made for hire" to which the Players contribute their performances within the scope of their employment. Pet. App. at 5a-11a. As did the district court, the court of appeals also found that the Players' claims of a right to control the telecasts of the games were equivalent to a claim of copyright and thus were preempted. Pet. App. at 18a-28a.

With regard to the master-servant count, the Seventh Circuit vacated the district court's judgment and remanded the matter for a determination as to what law governs the common law issues. The district court was directed on remand to determine the appropriate choice-of-law rule under Illinois conflicts law and to make the factual findings necessary to identify the governing law. Pet. App. at 32a.

Like the district court, the Seventh Circuit recognized that the dispute between the Players and Clubs was essentially a collective bargaining matter. In its opinion, the court of appeals stated that in this litigation, the Players had "attempted to obtain ex post what they did not negotiate ex ante." Pet. App. at 28a. The court of appeals concluded that the Players remained free to attempt to obtain their objectives by bargaining with the Clubs. *Id.*

REASONS FOR DENYING THE WRIT

Although the Players seek to portray this case as presenting an important legal issue, it is evident that the issue decided by the court of appeals has no significance to the public at large. In fact, the declaratory judgment affirmed below does not and could not even purport to resolve the only issue of practical consequence to the parties—the level of compensation of the Players. Rather, the judgment below affects only the negotiating strengths and strategies of the parties in their continued collective bargaining. Given the lack of public significance of the case, review by this Court is unwarranted.

Furthermore, the petition should be denied because the case has been remanded to the district court for further proceedings in connection with the Clubs' master-servant law count. That count furnishes independent grounds for the result here reached, and if the judgment on the count is reinstated by the district court, this Court's determination of the issue now presented would be rendered entirely unnecessary.

Finally, and equally important, the court of appeals' decision conflicts with no decision of this Court or any other court of appeals and was correctly decided. The Players' argument that the federal copyright law does not preempt their publicity rights in their televised performances willfully ignores the "works made for hire" doctrine, which specifically authorizes the Clubs to control the videotaped telecasts of Major League Baseball games in which the Players are hired to perform.

Because the Players claim an independent right to control those telecasts, their claims are preempted, and the court of appeals correctly so found. Nothing in the Seventh Circuit's decision, however, operates to destroy any traditional state law property rights.

I.

THIS CASE PRESENTS NO ISSUE OF PUBLIC IMPORTANCE.

It is well established that for a case to be of sufficient importance to warrant review by this Court, the case must be important "to the public" and not merely important to the particular parties involved in the dispute. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *accord Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955). And the issue presented to this Court must be "beyond the academic or the episodic." *Rice*, 349 U.S. at 74.

The decision in this case can hardly be said to satisfy these criteria. All that the dispute concerns is whether one of the most highly compensated groups of professional athletes in the world can use common law right of publicity claims as a legal lever against their Club employers with which to attempt to negotiate even greater levels of compensation for their services. This kind of garden variety collective bargaining dispute should not occupy the attention of this Court, because any decision by this Court will only lead the parties back to the bargaining table, where they will continue their "on-going struggles" over how to divide the revenues which flow from Major League Baseball. *See* Pet. App. at 49a.

For the same reasons, the outcome of this case will not "directly affect the rights of all professional athletes, as well as other types of professional entertainers," as the Players contend. Petition at 4. As the district court noted below, the

collective bargaining arrangements of other groups of athletes and entertainers reflect merely "the contractual results different performers and their employers have reached through negotiation and hard bargaining." Pet. App. at 45a. Furthermore, because these arrangements "arise from bargaining and compromise, they are not particularly analogous" to the Players' and Clubs' situation. *Id.* The parties in these other entertainment industries will continue to negotiate over the particular economic issues of concern to them, regardless of the decision in this case.

The Players' effort to identify an issue of public importance in this case is totally unavailing. Because of the demonstrable lack of any such issue, this Court should decline review.

II.

THE PROCEEDINGS BELOW HAVE NOT BEEN COMPLETED AND MAY OBVIATE ANY NEED FOR REVIEW.

The petition for certiorari should also be denied because the final disposition of proceedings below may obviate the need for any review by this Court. The Seventh Circuit has remanded the judgment with respect to the Clubs' master-servant common law count. Pet. App. at 32a. The remand was prompted by the fact that although the district court concluded that the Clubs' common law rights precluded the assertion of the Players' publicity rights claims, *see* Pet. App. at 41a-44a, it did not specifically identify the law governing such claims. As a result, the district court was directed upon remand to determine such governing law. Pet. App. at 32a.

The district court has yet to consider this issue upon remand. However, should the district court determine that applicable law supports the Clubs' position, then the Clubs' alternative master-servant law count would provide an independent and adequate ground for fully disposing of this action without the

necessity of addressing the federal copyright law issue. In such event, the writ of certiorari would be improvident. *Cf. Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977).

Because the court of appeals has "remanded the case, it is not yet ripe for review by this Court." *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967). Accordingly, the petition should be denied.

III.

THE DECISION OF THE COURT OF APPEALS PRESENTS NO CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS AND WAS CORRECTLY DECIDED.

The Players in their petition do not and cannot contend that the decision of the court of appeals is in conflict with any decision of this Court or any other court of appeals. Rather, the Players assert that the Seventh Circuit's decision should be reviewed by this Court on the grounds that it radically expands the preemptive effect of the Copyright Act, adds "confusion" to the question of the scope of preemption under the Act, and operates to destroy a large body of preexisting state property rights. Petition at 9-11. In so claiming, the Players distort the court of appeals' holding and mischaracterize its impact. As demonstrated below, the court of appeals' decision is neither radical nor confusing, but instead simply follows fundamental copyright law principles in holding that the Clubs, and not their player-employees, have the right to control the copyrighted game telecasts. The court of appeals' preemption analysis is entirely consistent with that adopted by the other courts of appeals, and the decision does nothing to extinguish any state law rights that have been recognized to exist independent of copyright law. As a result, the court of appeals' decision is in no need of review by this Court.

A. The Court Of Appeals Correctly Determined That The Game Telecasts At Issue Here Are "Works Made For Hire."

The central principle of copyright law upon which the court of appeals relied in its decision is the familiar and fundamental "works made for hire" doctrine, which provides that where an employee produces a copyrightable work within the scope of his employment, ownership of all of the rights comprised in the copyright vests in his employer by operation of law.[5]

One of the "basic principles" of copyright law,[6] the "works made for hire" doctrine in the 1976 Copyright Act codified a principle which had long been recognized at common law and in the 1909 Copyright Act, and which has found expression in decisions of this Court and in the courts of appeals for nearly a century. *See Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903); *Scherr v. Universal Match Corp.*, 417 F.2d 497, 500-01 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); *Sawyer v. Crowell Pub. Co.*, 46 F. Supp. 471, 473 (S.D.N.Y. 1942), *aff'd*, 142 F.2d 497 (2d Cir.), *cert. denied*, 323 U.S. 735 (1944). The courts have continued to routinely apply the doctrine under the 1976 Act. *See Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984); *Roth v. Pritikin*, 710 F.2d 934 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983).

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5 Section 201 of the Copyright Act provides that:

> [i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright. 17 U.S.C. § 201(b).

A "work made for hire" is defined simply as "a work prepared by an employee within the scope of his or her employment. . . . " 17 U.S.C. § 101.

Similarly, Section 26 of the 1909 Copyright Act provided that the "author," and hence owner, of a copyrighted work "shall include an employer in the case of works made for hire." Act of March 4, 1909, ch. 320, 35 Stat. 1075.

6 *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5736.

As is evident from these cases, an employer has always been legally free to exploit a copyrighted work produced by an employee within the scope of his employment. In this respect, the 1976 Act did not change existing law. With the addition of the provisions for "simultaneous fixation" of live sports telecasts, the Act simply extended to sports clubs the same rights enjoyed by other owners of copyrighted works, including the rights of an employer in the case of a "work made for hire."[7]

Given the significance of the "works made for hire" doctrine to the issues in this case and to the court of appeals' decision, it is remarkable that the Players virtually ignore it, relegating it to a single passing reference at page 7 of their petition. But the lengths to which the Players have gone in avoiding discussion of this fundamental principle serve only to underscore the untenability of their position. For once it has been determined that an employee has produced a copyrighted work within the scope of his employment, then it will inevitably follow that any claim of right by the employee to control the very work he has created will be foreclosed, absent an express written agreement to the contrary.

Here, both the district court and the court of appeals determined that the Players' performances before television audiences as incorporated in the copyrighted game telecasts are within the scope of their employment. *See* Pet. App. at 10a-11a, 38a. Both courts further determined that the parties had not expressly agreed in writing to assign to the Players the copyright ownership in the telecasts of the games, and that no genuine issue of fact existed in this regard. Pet. App. at 12a-

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7 Before January 1, 1978, the effective date of the 1976 Copyright Act, a live telecast of a baseball game or other sporting event was not subject to federal copyright protection because it was not "fixed" at the time of broadcast to the public. At the urging of the professional sports leagues, including Major League Baseball, Congress corrected this technical problem by adopting the concept of "simultaneous fixation" in the new Copyright Act. Under this concept, a live televised sporting event or other performance is regarded as "fixed" in a tangible medium of expression if it is simultaneously recorded on film or videotape. *See* 17 U.S.C § 101.

17a, 40a-41a. As a result, the Clubs own the copyrighted telecasts as "works made for hire," and no right of publicity claims by the Players can be permitted to interfere with such ownership under federal copyright law.

B. The Court of Appeals Correctly Concluded That The Players' Claims Are Preempted.

Having determined that the telecasts of Major League Baseball games are copyrightable "works made for hire," the court of appeals also correctly proceeded to conclude that the Players' claims of "publicity rights" in their performances as embodied in such works are preempted by the Copyright Act. Indeed, far from constituting a radically expansive interpretation of the preemptive scope of the Copyright Act, the Seventh Circuit's preemption analysis flows naturally and inescapably from the application of the "works made for hire" doctrine discussed above.

With regard to Section 301 of the Copyright Act, the court of appeals found that the Players' publicity rights claims are plainly "equivalent" to copyright since their rights are allegedly violated by the Clubs' exercise of at least one of the exclusive rights set forth in Section 106 of the Act, specifically, the right to perform publicly or to authorize the public performance of the audiovisual works in question. Pet. App. at 23a-25a. In so concluding, the court of appeals applied the same equivalence test which has been adopted by the other circuit courts of appeals—that is, a right is equivalent to copyright if it "is infringed by the mere act of reproduction, performance, distribution or display." Pet. App. at 24a (quoting 1 M. Nimmer, *Nimmer on Copyright* § 1.01[B], at 1-11 (1986)).[8] Thus, it is

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8 *Accord Donald Frederick Evans & Assocs. v. Continental Homes, Inc.*, 785 F.2d 897, 914 (11th Cir. 1986); *Ehat v. Tanner*, 780 F.2d 876, 878 (10th Cir. 1985), *cert. denied*, ___ U.S. ___, 107 S. Ct. 86 (1986); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985); *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656, 662-63 (6th Cir. 1982), *aff'g in pertinent part*, 496 F. Supp. 408, 443-44 (S.D. Ohio 1980).

evident that the Seventh Circuit did not find preemption based upon "vague notions of similarity" or merely because "both rights [of publicity and copyright] are concerned with commercial exploitation of human activity," as the Players contend. Petition at 17. Rather, the court of appeals made a specific and precise application of the recognized test for equivalence under Section 301 of the Copyright Act.

Despite the correctness of the Seventh Circuit's preemption analysis, the Players argue that the decision below cannot be allowed to stand because it would do away with *all* state law right of publicity claims. *See* Petition at 10-11, 14-16, 18-19. The decision has no such effect, and the Players' protestations of alarm rest on nothing more than a distorted characterization of what this case involves.

The instant case has nothing to do with right of publicity claims to prevent unauthorized uses of the Players' names and likenesses *per se*—a right the Clubs do not contest—but instead involves claims of rights in the very performances which the Players have been employed to render as part of a copyrighted work. The Clubs readily concede, and the court of appeals expressly acknowledged, that the Players' rights of publicity with regard to the merchandising of their names and likenesses on commercial products (such as cereal boxes or chewing gum cards) are not preempted by the Copyright Act, since their names and likenesses are not themselves copyrightable. *See* Pet. App. at 23a n.24. But an employee/performer whose name and likeness is an integral part of his performance for hire in a copyrighted work may not assert control over the exhibition of that work under the guise of the "right of publicity." In such a case the Copyright Act itself, by virtue of the "works made for hire" doctrine, authorizes the employer to "fix" such work and to control its public exhibition to the preclusion of contrary claims by the employee.[9]

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9 Under the Copyright Act, a work is "fixed" when the fixing is done "by or under the authority of the author," which includes the employer in the case of a "work made for hire." 17 U.S.C. § 101.

None of the cases cited by the Players for the proposition that copyright law does not preempt publicity rights involved claims of right in a performance for hire, but instead involved claims by an individual against an independent party acting without color of right, wholly apart from an employment relationship. *See* Petition at 18-19. In such cases preemption is unwarranted, for obviously one cannot make an unauthorized copy of a person's likeness, for example, by taking a surreptitious photograph, then claim to have preempted any right of publicity claims in that likeness merely by copyrighting the photograph. Such cases are inapposite here, however, since the Clubs are not strangers to the Players, but rather are their employers acting under authority of the "works made for hire" doctrine. Accordingly, the Players' publicity rights claims cannot escape preemption, and no review of this straightforward conclusion is necessary by this Court.

C. The Court Of Appeals Correctly Determined That The Players' Performances As Incorporated In The Game Telecasts Are Copyrightable "Works of Authorship."

The only remaining contention advanced by the Players to avoid application of the "works made for hire" doctrine and the inevitable preemption of their claims is that the works produced by them are not "works of authorship." As both the district court and court of appeals recognized, however, this contention is entirely without merit. *See* Pet. App. at 8a n.7, 38a-39a. Every federal court which has considered the issue has held that telecasts of professional sports events are copyrightable "works of authorship," that they qualify for copyright protection as "audiovisual works" within the meaning of Section 101 of the Copyright Act, and that sports clubs own the copyright to the telecasts of their games. *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 534 F. Supp. 533, 534 n.5 (N.D.N.Y), *rev'd on other grounds,* 691 F.2d 125 (2d Cir. 1982), *cert. denied,* 459 U.S. 1226 (1983); *New Boston Television, Inc. v. Entertainment & Sports Programming Network, Inc.*, 215 U.S.P.Q. 755, 756 (D. Mass. 1981); *National Football*

League v. McBee & Bruno's, 621 F. Supp. 880, 885 (E.D. Mo. 1985), *aff'd in pertinent part*, 792 F.2d 726 (8th Cir. 1986); *Entertainment & Sports Programming Network, Inc. v. Edinburg Community Hotel*, 623 F. Supp. 647, 653 (S.D. Tex. 1985).

The Clubs' copyright ownership of the telecasts of their games, necessarily founded upon the Clubs' "authorship" of the games, has also been confirmed by the Copyright Royalty Tribunal, a federal agency established by Congress under the Copyright Act to distribute royalties to the owners of copyrighted television programming for the cable television retransmissions of their programs. *See* 17 U.S.C. § 111(d); 1979 Cable Royalty Distribution Remand Proceeding, 49 Fed. Reg. 3,899 (1984); 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9,552, 9,565 (1983). Thus, the court of appeals' decision as to the copyrightability of the game telecasts is consistent with congressional, administrative and judicial confirmations of the Clubs' copyright ownership.

Notwithstanding the Clubs' conceded copyright ownership of the game telecasts, the Players attempt to argue that their own contributions to these audiovisual works—their performances incorporated therein—are not "works of authorship" because they are insufficiently "creative" or "aesthetic." Petition at 21. The court of appeals rightly rejected this argument as contrary to the long-established principle that only a modicum of creativity is required for a work to be copyrightable, and as contrary to the expressed congressional intention that the term "works of authorship" does not include any requirement of aesthetic merit. *See* Pet. App. at 8a n.7. As Justice Holmes once stated:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits . . . . if they command the interest of any public, they have a commercial value—it would be bold to say they have not an

> aesthetic and educational value—and the taste of any public is not to be treated with contempt.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903).[10]

Indeed, the Players' performances are no different from contributions made by an actor to a motion picture, or a singer to a copyrighted sound recording, all of which are regarded as copyrightable "authorship" making up part of the total authorship for the ultimate fixed work.[11] *See* 1 M. Nimmer, *supra*, § 2.04[B], at 2-40 ("the cameraman, *the actors* (and others) create an audiovisual work . . . ") (emphasis added). Where the contributions of such performers are rendered as employees for hire, copyright ownership thereof will vest with their respective employers. *Id.* § 2.10[A], at 2-149-50. Thus, the Players' final argument for avoiding preemption of their claims is of no avail.

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10 In *National Football League v. McBee & Bruno's*, *supra*, the court observed that the "work of authorship" which is recorded in a telecast of a professional sports game is not merely the work of the cameraman or telecast director, but most importantly *the game itself*:

> It is the aria from Puccini as sung by Pavarotti at Kennedy Center and the performance of Aida at the Metropolitan and the football game between the Cardinals and another team that the television viewers take delight in . . . The fixation, therefore, is the "original 'works' of authorship" which is the opera, the dance ensemble . . . *and the game*.

621 F. Supp. at 886 (emphasis added). Moreover, in recognizing the Clubs' common law property rights as the creators of their games, courts have acknowledged the many creative and dramatic elements which the games comprise, not least of which are the "original and unique performances of highly skilled performers." *National Exhibition Co. v. Fass*, 143 N.Y.S.2d 767, 770 (Sup. Ct. 1955); *see Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *Liberty Broadcasting System v. National League Baseball Club of Boston, Inc.*, 1952 Trade Cas. (CCH) ¶ 67,278 (N.D. Ill. 1952).

11 As noted in the House Committee Report to the 1976 Act:

> The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both *on the part of the performers whose performance is captured* and on the part of the record producer

CONCLUSION

As demonstrated above, the Seventh Circuit's decision is correct, it conflicts with no decision of this Court or any other court of appeals and it presents no issue of importance to the public. It thus presents no circumstances justifying review by this Court, particularly where the case has been remanded for further proceedings which may well obviate the need to consider the question presented. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

LOUIS L. HOYNES, JR.
Counsel of Record

DONALD E. EGAN
LEE ANN WATSON
Katten, Muchin, Zavis, Pearl, Greenberger & Galler
525 West Monroe Street
Chicago, Illinois 60606
(312) 902-5200

ROBERT J. KHEEL
LAWRENCE O. KAMIN
JOHN R. OLLER
Willkie Farr & Gallagher
One Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 935-8000

JAMES P. GARNER
GEORGE DOWNING
Baker & Hostetler
3200 National City Center
Cleveland, Ohio 44114
(216) 621-0200

Attorneys for Respondents

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responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 56, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5669 (emphasis added); *see also id.* at 52, 1976 U.S. Code Cong. & Ad. News at 5665-66 (listing "improvisations" and "performances" as works of authorship).

APPENDIX

RULE 28.1 LISTING

1. Atlanta National League Baseball Club, Inc.

   Parent: Turner Broadcasting System, Inc.

   Subsidiaries: Atlanta Braves, Inc., Atlanta Chiefs, Inc., Braves Productions, Inc., The Stadium Club, Inc., Stadium Restaurants, Inc.

   Affiliates: Atlanta Hawks, Inc., C.N.N., MGM Entertainment Co., RET Corp., Super Station Inc., TBS Productions, Inc., Turner Broadcasting Sales, Inc., Turner Marketing, Inc., Turner Music Publishing, Inc., Turner Music Service, Inc., Turner Network Television, Inc., Turner Omni Ventures, Inc., Turner Program Services, Inc., Turner Reciprocal Advertising Corp., Turner Teleport, Inc., Turner Television Stations, Inc.

2. Chicago National League Ball Club, Inc.

   Parent: Tribune Co.

   Affiliates: Chicago Tribune Co., Green Sheet Publications, Inc., News Building, Inc., News & Sun-Sentinel Co., New York News, Inc., Sentinel Communications Co., Sunbelt Publishing Co., Tribune Broadcasting Co., Tribune Cable Communications, Inc., Tribune Na'ional Marketing Co. Tribune Newspapers West, Inc.

3. John E. Fetzer, Inc. (Detroit Tigers)

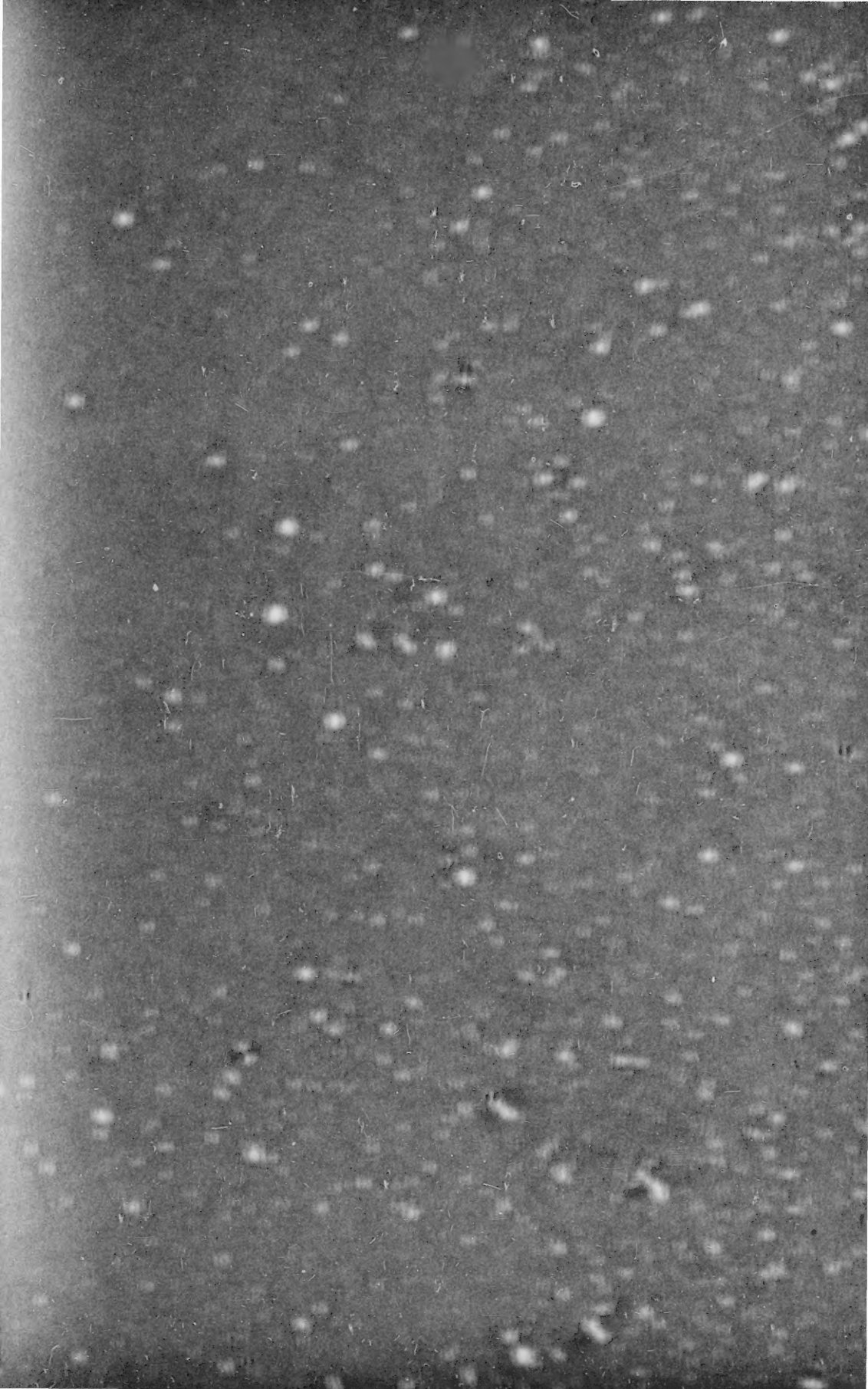
   Parent: TISM, Inc.

   Affiliates: Domino's Pizza, Inc.

4. St. Louis National League Baseball Club, Inc.

   Parent: Anheuser-Busch Companies, Inc.

Affiliates: Anheuser-Busch, Inc., Anheuser-Busch International, Inc., Busch Agricultural Resources, Inc., Busch Creative Services Corp., Busch Entertainment Corp., Busch Industrial Products Co., Busch Properties, Inc., Campbell Taggart, Inc., Civic Center Corp., Container Recovery Corp., Eagle Snacks, Inc., Manufacturers Railway Co., Metal Container Corp., Metal Label Corp., St. Louis Refrigerator Car Co.



Supreme Court, U.S.
FILED
MAR 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1260

In the Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
PETITIONER

v.

BALTIMORE ORIOLES, INC., ET AL., RESPONDENTS

STEPHEN D. ROGERS, ET AL., PETITIONERS

v.

BOWIE K. KUHN, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONERS

Of Counsel:

DONALD M. FEHR
Major League Baseball Players Association
805 Third Avenue
New York, NY 10022

ANDREW L. FREY
KENNETH S. GELLER
STEPHEN M. SHAPIRO
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JAMES W. QUINN
Counsel of Record

R. BRUCE RICH
ROBIN E. SILVERMAN
Weil, Gotshal & Manges
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR THE PETITIONERS

We showed in the Petition that the court of appeals adopted an overly broad and plainly erroneous construction of the preemption provision of the Copyright Act of 1976. The Brief in Opposition reveals the weakness of the Owners' response. The Owners begin with two perfunctory reasons why the decision below does not warrant review. When they finally turn to the merits, the Owners offer a deceptive, confusing, and wholly unresponsive discussion that consists of little more than

the constant repetition of two legal arguments, one of which is demonstrably irrelevant to this case and the other of which largely begs the issue in dispute.

A. The Court of Appeals' Preemption Ruling Is Ripe For Review.

The Owners' argument (Br. in Opp. 7-8) that this case is not ripe for review reflects a misunderstanding of the relevant jurisdictional rules governing review on certiorari. It is true, as their citation to *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977), suggests, that this Court ordinarily will not review interlocutory decisions of state courts. But that is because 28 U.S.C. § 1257 requires that a state court decision represent the "[f]inal judgment[] or decree[]" in the case. There is no similar jurisdictional requirement under 28 U.S.C. § 1254, and thus "the fact that the decision below lacks finality is no bar to review of cases in the court of appeals * * *." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 2.2 at 41 (6th ed. 1986). *See also* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4036 (1978 & Supp. 1986).

Moreover, even viewed from a prudential standpoint, there is absolutely no reason why the remand ordered by the court of appeals should lead this Court to deny review. This is not a case in which a lower court has remanded for further proceedings *on the issue presented by the petition.* In *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R. Co.*, 389 U.S. 327 (1967), the case on which the Owners rely, the petitioners sought certiorari to challenge an order holding them in contempt even though the court of appeals had "remanded to the District Court to consider whether there had in fact been a contempt * * *." *Id.* at 328. Plainly, in that situation, the question presented in the petition might well have been eliminated from the case by the proceedings on remand, and it would have been inappropriate to grant review. Here, by contrast, the

court of appeals has fully disposed of the copyright preemption issue, and nothing that can or will happen on remand will affect the finality of that ruling.[1]

Thus, the Owners' "ripeness" argument is little more than a trap to prevent any further review of the court of appeals' dubious preemption decision. Although the Owners hypothesize that they might prevail on the master-servant issue on remand, they do not explain why the district court would feel the need to decide that issue, given the copyright preemption ruling; nor do they explain how, should the district court rule for the Players on the master-servant issue, it would alter the ultimate disposition of this case. *See* Pet. 9 n.9. Indeed, it is crystal clear from the Seventh Circuit's opinion that it fully expects the district court on remand merely to dismiss the master-servant count without prejudice. *See* Pet. App. 32a-33a. If the preemption issue otherwise warrants review, it seems pointless to require the Players to repeat the appellate process after these events have occurred.

B. The Preemption Question Presents An Issue Of Substantial Public Importance.

The Owners contend (Br. in Opp. 6-7) that the preemption issue raised in the Petition is of little significance because "any decision by this Court will only lead the parties back to the bargaining table" (*id.* at 6). But if the resolution of a legal issue will affect a great many economic relationships, as the preemption issue surely will, it does not matter that its impact on each such

[1] This also is not a situation where a party that can *win* its case on either of two independent grounds loses on one ground in the court of appeals and attempts to gain this Court's review while the alternative ground remains to be litigated. In that situation, the party seeking certiorari may still win the case on remand, thus mooting the controversy over the first legal issue. In the instant case, however, the Owners have merely pointed out that the party seeking certiorari might *lose* the case on remand on another ground. That speculation is not a reason to deny review.

relationship may not be dispositive but could be altered by agreement of the parties. That can be said of many important legal issues, particularly in the labor relations field.

In any event, the Owners' self-serving claim that this case is of no public importance is transparently false for a number of reasons. First, as we pointed out in the Petition (at 10-11), both Congress and numerous commentators have recognized that the preemption section of the Copyright Act is one of the most significant and fundamental aspects of the 1976 legislation. Given the weight that Congress obviously attached to this "bedrock" provision of the Act (H.R. Rep. No. 1476, 94th Cong., 2d Sess. 129 (1976)), it is inherently implausible that the court of appeals' unprecedented construction would be of no general concern.

The Owners' assertions are further belied by the *amicus curiae* briefs filed (over the Owners' objections) in support of the Petition. These briefs, submitted by associations representing the interests of athletes in other major professional sports, as well as the range of performing artists, confirm the Players' stated concerns as to the deleterious impact that the Seventh Circuit's ruling will have on the ability of such performers to protect and exploit their valuable publicity rights. The *amicus* brief submitted by the other players' associations states that the decision below jeopardizes the ability of athletes to safeguard their "carefully-developed, long-protected, and valuable assets in their names, likenesses and performances" (Am. Br. of NFL Players Ass'n, *et al.*, 8) and concludes that the ruling's "potential for disruption of the professional lives of thousands of athletes is immense" (*id.* at 9). The *amicus* brief describing the interests of numerous performing artists likewise notes that the Seventh Circuit's reasoning "could wreak havoc in the performing arts industry" (Am. Br. of Associated Actors and Artistes 7). These representations provide a more accurate barometer of public importance

than do the Owners' unsubstantiated predictions about "collective bargaining arrangements" (Br. in Opp. 7).

Finally, the Owners' efforts to minimize the significance of the decision below fail to appreciate the federalism implications of the Seventh Circuit's broad preemption analysis. Whenever federal law is held to preempt state law, the powers of the sovereign states are thereby diminished. When the states are prohibited from legislating in areas of traditional state concern, the prohibition is particularly troubling. *See Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). If, as we contend, the decision below erroneously reads the Copyright Act in a manner that could impair a broad range of state statutory and common law doctrines—contract, right of privacy, publicity, etc.—then it is inconceivable that such a ruling could be of no public importance.

C. The Owners Have Failed to Support The Court of Appeals' Preemption Analysis.

The Owners' response on the merits is equally unpersuasive. The Owners do not dispute our contention (Pet. 18-19) that the decision below conflicts with every other decision or opinion to address the merits of the issue whether the 1976 Copyright Act preempts state law rights of publicity. Nor do they make any effort to contest our showing (Pet. 12-13 & nn. 10, 11) of substantial confusion in the lower courts over the approach to determining when state law causes of action are preempted by Section 301. Instead, the Owners build their defense of the decision below on two misleading and unresponsive propositions: that they own the copyrights in the videotaped telecasts of the Players' game performances (*see, e.g.*, Br. in Opp. 8, 9, 10, 11, 14); and that the scope of the employment relationship between the Players and the Owners provides the Owners with "work for hire" copyrights in the game performances, which per-

mit them to exploit those performances without limitation on any and all media (*see* Br. in Opp. 10, 12).

1. *The Finding of Preemption Cannot Properly Rest on Ownership of the Copyrights in Game Telecasts.* As noted in the Petition (at 8 n.8), this case has nothing to do with who owns the copyrights in the telecasts of Major League Baseball games. Even if the Owners own those copyrights, that fact would shed no light on whether the Players' state law rights of publicity in their game performances are preempted. The preemption issue depends upon whether the Players are asserting rights in a copyrightable "work" and, if so, whether the rights they are asserting are "equivalent" to one or more rights granted by the Copyright Act. The Brief in Opposition says precious little about those crucial issues.

As we discussed in the Petition (at 20-25), the Owners' interests in the telecasts could have a bearing on this dispute only if the Players' game performances themselves constitute copyrightable "works" that are subject to the Owners' control under the "work for hire" doctrine. But it is well settled that game performances do *not* so qualify as copyrightable works (M. Nimmer, *Nimmer on Copyright* § 1.08 [C] [2] at 1-51 & n.39 (1986)), thus rendering the Owners' thread of "reasoning" both legally erroneous and highly misleading.[2] *See also* McLane, *The Right of Publicity: Dispelling Survivability, Preemption and First Amendment Myths Threatening To Eviscerate a Recognized State Right*, 20 Cal. W.L. Rev. 415, 422-425 (1983).

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[2] The Owners suggest, by selective quotation from *Nimmer on Copyright* (Br. in Opp. 11), that a state law will be preempted if it "is infringed by the mere act of reproduction, performance, distribution or display." Professor Nimmer in fact observes that where a state cause of action requires elements *additional to* any or all of these, "there is *no* preemption." *Nimmer on Copyright* § 1.01[B] at 1-12 (emphasis added). The recognition that causes of action based on publicity rights do entail additional elements has led all other courts addressing this issue to conclude that such rights are not preempted by the Copyright Act. *See* Pet. 18-19.

Moreover, as we explained in the Petition (at 23-24), the suggestion that ownership of the copyright in the audiovisual rendition of a game or other performance would control the question whether federal copyright law preempts state publicity rights proves too much. It would permit anyone who, through any means, created an audiovisual work to proclaim that, by virtue of his copyright rights in that work, he thereby defeated the state law rights of the persons whose personalities, images, and performances were captured in the work.

Obviously uncomfortable with this result, the Owners attempt to minimize the sweeping consequence of their argument by asserting that preemption would be limited to those instances in which the audiovisual work captured live performances assertedly rendered within the scope of an employment relationship. This proposition is incorrect, for the reasons stated at Pet. 24. But, as we next discuss, the Owners' supposed limitation would not help them here even if it were correct, because it both assumes a state of facts that has not been established and begs the core copyright issue—*i.e.*, whether non-copyrightable game *performances* become subject to control by virtue of ownership of a copyright in the *telecasts* of such game performances.

2. *Neither the "Work for Hire" Doctrine nor Claims About the Parties' Employment Relationship Support the Owners' Position.* The Owners repeatedly assert that the Players have been employed to produce a copyrighted work within the scope of their employment (*e.g.*, Br. in Opp. 10, 12), thereby enabling the Owners to obtain "work for hire" (or, in a phrase of their coining, "performance for hire") copyrights in the game telecasts. Concealed within this assertion is a deliberate blurring of the distinction between what the Players are employed to do (play baseball games) and what is a copyrightable "work" (an audiovisual rendition of a game). This distinction was explained at Pet. 20-23, and none

of the authorities cited by the Owners casts the least doubt on its soundness.[3]

But there are more fundamental flaws in this line of argument advanced by the Owners. Whether the Players retain state law publicity rights in their game performances almost surely depends, as a matter of state law, on whether the employment relationship over the years since televising of games began has embraced playing for television audiences.[4] Thus, if the Owners were correct in their description of the employment relationship, then any publicity rights the Players might have possessed would have been yielded to the Owners *as a matter of state law.* That, however, was *not* the rationale of the court of appeals; had the Seventh Circuit determined the state law issue favorably to the Owners, there would have been absolutely no reason for the court to discuss

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[3] The authorities cited by the Owners in support of their position either deal not at all with copyright issues, *see, e.g., Pittsburgh Athletic Co.* v. *KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938) (involving claim of unfair competition), or merely reaffirm the irrelevant proposition that, under the 1976 Act, telecasts of sporting events are copyrightable when recorded. *See, e.g., New Boston Television, Inc.* v. *Entertainment Sports Programming Network, Inc.*, 215 U.S.P.Q. 755 (D. Mass. 1981) (use of excerpts of a copyrighted telecast does not constitute fair use). None of these cases deals with the issue whether a likeness or game performance constitutes a copyrightable work.

[4] Of course, the Players have performed in games over this period knowing that they were being televised, but that does not suffice to establish acceptance by the Players that performances for television are an inherent part of the employment relationship. What the Owners fail to point out in describing (Br. in Opp. 2) the employment relationship during the era of televised baseball is that the Players have throughout maintained that the Owners have no right to televise the games without the Players' consent and that the Owners have consistently compensated the Players for the telecasts by committing a percentage of network television revenues to the funding of the Players' pension plan. *See, e.g.*, Players' C.A. App. A137, 178 [No. 201-202]; A1034, 1036.

whether the Players' publicity rights, already extinguished under non-copyright law by the employment relationship, had been preempted by the Copyright Act.

That the fact of employment cannot control preemption may be illustrated by applying the Owners' version of the "work for hire" doctrine to a hypothetical they themselves suggest (*see* Br. in Opp. 15 n.10). Suppose Pavarotti were hired to perform Puccini arias at the Kennedy Center, perhaps to be compensated by receiving a percentage of ticket sales. Suppose further that without his consent the producers arranged to have the performance nationally telecast, for which they received a large sum that they refused to share with Pavarotti. Could the performer object to this nationwide exploitation of his name and performance, or would any state law right of publicity be preempted by the producers' copyright in the televised version of his performance?

Under the court of appeals' reasoning and the Owners' arguments in this Court, because Pavarotti was employed by the producers to perform Puccini arias, and because that performance is (under their arguments) itself a "work of authorship," the "work for hire" doctrine of copyright law would extinguish Pavarotti's right to object to the unauthorized commercial exploitation of his skills and reputation. We think that any dispassionate observer would agree that this preposterous consequence of the Owners' position simply cannot be the law —and there is no legally significant distinction between the hypothetical and the instant case.

In sum, the Owners have utterly failed to explain how their ownership of the copyrights in the game telecasts could properly extinguish any state law right of publicity the Players retain. The decision of the court of appeals unwittingly converts the Copyright Act from a protection of the rights of producers of audiovisual works against expropriation of their efforts by unauthorized third parties into a means by which employers can

unreasonably exploit their employment relationship with performers. That unsettling development warrants this Court's review.

Respectfully submitted.

Of Counsel:

DONALD M. FEHR
Major League Baseball Players Association
805 Third Avenue
New York, NY 10022

ANDREW L. FREY
KENNETH S. GELLER
STEPHEN M. SHAPIRO
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

MARCH 1987

JAMES W. QUINN
Counsel of Record

R. BRUCE RICH
ROBIN E. SILVERMAN
Weil, Gotshal & Manges
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Attorneys for Petitioners

MOTION FILED
FEB 27 1987

No. 86-1260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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—v.—

BALTIMORE ORIOLES, INC., ET AL.,

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STEPHEN D. ROGERS, ET AL.,

Petitioners,

—v.—

BOWIE K. KUHN, ET AL.,

Respondents.

IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF OF THE ASSOCIATED ACTORS AND ARTISTES OF AMERICA—AFL-CIO, AS *AMICUS CURIAE*

JEROME LURIE
COHN, GLICKSTEIN
& LURIE
Of Counsel

MORTIMER BECKER*
BECKER LONDON KOSSOW
& JAFFE
30 Lincoln Plaza
New York, New York 10023
(212) 541-7070

* *Counsel of Record for Amicus Curiae*

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IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE ASSOCIATED ACTORS AND ARTISTES OF AMERICA—AFL-CIO, FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Associated Actors and Artistes of America—AFL-CIO (the "Four A's") hereby seeks leave of this Court to file a brief as *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of the petition

of the Major League Baseball Players Association ("MLBPA"), Stephen D. Rogers, Steven Renko, Jr. and Robert R. Boone (collectively referred to herein as the "Players") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on October 29, 1986.* This motion is necessitated by the refusal of counsel for respondents, The Commissioner of Major League Baseball, The National League of Professional Baseball Clubs, The American League of Professional Baseball Clubs, the Major League Baseball Promotion Corporation and the Major League Baseball Owners (collectively, "the Owners" or "the Clubs") to grant permission to file such *amicus* brief. The brief of the Four A's, conditionally filed herewith, is annexed to this motion.

Interest of the *Amicus*

The Four A's is an association composed of the following organizations: Actors' Equity Association; American Federation of Television & Radio Artists; American Guild of Musical Artists; American Guild of Variety Artists; Asociación Puertorriqueña de Artistas y Tecnicos del Espectaculo; Hebrew Actors' Union, Inc.; Italian Actors Union; Screen Actors Guild; and Screen Extras Guild, Inc. The Four A's and its member organizations represent the interests of more than 123,000 actors, artists and others involved in the dramatic and performing arts. The representation provided by *amicus* and its constituent organizations to their respective members involves such matters as assisting in contract negotiations and dispute resolution, and monitoring legislative and judicial developments of import.

In its capacity as representative of the interests of numerous performing artists, *amicus* is deeply concerned over the development and preservation of intellectual property and other

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* The opinion of the court of appeals is reported at 805 F.2d 663 (7th Cir. 1986) and appears as Appendix A to the Players' petition.

rights which will impact upon the livelihoods of its constituents' members. Both the copyright laws and state right of publicity laws play prominent roles in the professional lives of the members of *amicus*' constituent organizations. Where, as here, a legal precedent emerges that can severely damage individuals involved in the dramatic and performing arts, *amicus* is constrained to express its views concerning such precedent.

The *amicus* brief conditionally filed herewith explains why *amicus* believes that the Seventh Circuit's decision is fundamentally incorrect, and how this erroneous decision will negatively impact upon the dramatic and performing arts. It is therefore respectfully requested that *amicus*' motion for leave to file the annexed brief be granted.

Respectfully submitted,

/s/ Mortimer Becker
MORTIMER BECKER*

JEROME LURIE
COHN, GLICKSTEIN
& LURIE
Of Counsel

BECKER LONDON KOSSOW
& JAFFE
30 Lincoln Plaza
New York, New York 10023
(212) 541-7070

**Counsel of Record*
for Amicus Curiae

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BRIEF OF THE ASSOCIATED ACTORS AND ARTISTES OF AMERICA—AFL-CIO, AS *AMICUS CURIAE*

Preliminary Statement

The Associated Actors and Artistes of America—AFL-CIO (the "Four A's") submits this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of Petitioners, the Major League Baseball

Players Association, Stephen D. Rogers, Steven Renko, Jr. and Robert R. Boone (collectively referred to herein as the "Players").

Interest of the *Amicus*

The interest of the *amicus curiae* is set forth in the preceding motion papers.

Summary of Argument

The Seventh Circuit committed two fundamental errors in holding that the Players' state-created publicity rights are preempted under the 1976 Copyright Act by reason of the televising of Major League Baseball games: first, it concluded that the right of publicity is a right "equivalent" to copyright; and second, it determined that the Players sought to exercise their publicity rights in copyrightable works of authorship.

Not only do these conclusions wreak havoc with established copyright doctrine; they also threaten to strip away an essential element of property protection afforded to many other individuals—such as those engaged in the dramatic and performing arts—who by reason of personal attributes and achievements have earned the right to "reap the reward of [their] endeavors." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977).

Argument

I.

The Right of Publicity Is A Right Separate and Distinct from Copyright

The right of publicity protects the intangible qualities that make each performer unique. The rights protected pursuant to the federal copyright scheme, 17 U.S.C. § 101 *et seq.* ("the Copyright Act" or "the Act"), protect the tangible fruits of an individual's labor. These two forms of legal protection complement one another; they neither clash nor provide for duplicative protection.[1]

To be subject to preemption under Section 301(a) of the Copyright Act,[2] the right of publicity would have to be shown to be "equivalent" to one or more of the exclusive rights conferred on copyright owners by Section 106 of the Act.[3]

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1 This is not to say that the right of publicity and copyright bear no resemblance, but merely that they protect and further different interests. *See generally Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977).

2 Section 301(a) of the Copyright Act provides in relevant part:

> [A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a).

3 Section 106 provides a copyright owner with the following exclusive rights:

> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;

(footnote continued on following page)

Prior to the rulings in this case, no court had found such an equivalence.[4] This is not surprising in light of the fundamentally disparate nature of the right of publicity in relation to the interests sought to be fostered by the copyright laws.

The right of publicity is a personal right that, in certain jurisdictions, does not even survive death. *See, e.g., Factors Etc., Inc.* v. *Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). It is primarily concerned with an individual's proprietary interest "to reap the reward of his endeavors," *Zacchini*, 433 U.S. at 573, by exploiting those attributes and achievements that have proven of value. The right is only tangentially concerned with a larger benefit to the public.

The copyright laws, in contrast, are designed to foster creative works of authorship—such as books, plays and musical compositions—principally for the public benefit. As this Court noted in *Sony Corporation of America* v. *Universal City*

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(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106.

4 All other courts addressing this issue have concluded that the right of publicity is *not* preempted by the copyright laws. *See, e.g., Bi-Rite Enterprises, Inc.* v. *Button Master*, 555 F. Supp. 1188 (S.D.N.Y. 1983); *Factors Etc., Inc.* v. *Pro Arts, Inc.*, 496 F. Supp. 1090 (S.D.N.Y. 1980), *rev'd on other grounds*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *Apigram Publishing Co.* v. *Factors Etc., Inc.*, No. C 78-525 (N.D. Ohio July 30, 1980).

This conclusion is further supported by the legislative history of the Act, which clearly contemplates the continued vitality of the right of publicity. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. at 129-33 (1976).

Studios, Inc., 464 U.S. 417, 429 (1984), the copyright laws are not "primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved." *Accord Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975) (quoting *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932)).[5]

For dramatic and performing artists, continued judicial recognition of these distinctions is of critical importance. For such artists create personae of significant commercial value, the exploitation and protection of which transcend the bounds of the copyright law. Publicity rights are, moreover, personal to the artist: the owner of a strip of celluloid simply cannot, under the authority of the copyright laws, deprive an artist of his or her ability fully to exploit such publicity rights.

The Seventh Circuit nevertheless found there to be "equivalence" between publicity rights and rights within the scope of the copyright law based upon the following circuitous reasoning: "Because the exercise of the Clubs' right to broadcast telecasts of the games infringes the Players' rights of publicity in their performances, the Players' rights of publicity are equivalent to at least one of the rights encompassed by copyright, *viz.*, the right to perform an audiovisual work." 805 F.2d at 677.

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5 Consistent with these observations is the recognition that an artist must establish different elements to prevail on a cause of action for invasion of his right of publicity than he would if he were to assert a copyright claim. In order to prevail on a cause of action for copyright infringement, a plaintiff must establish ownership of a copyright and copying of the copyrighted work by the defendant. Since direct evidence of copying is rarely available, the "copying" element of this cause of action is often established by proof of substantial similarity and access. *See* M. Nimmer, *Nimmer on Copyright* § 13.01, at 13-3 to 13-8.

In contrast, when a plaintiff brings suit to protect his right of publicity he must establish the elements of such cause of action as set forth in a state statute governing such rights or as established by state common law. In New York, for example, to prevail on a right of publicity theory, a plaintiff must establish that his name, portrait or picture has been used for advertising or trade purposes without his consent. N.Y. Civ. Rights Law § 51 (McKinney 1976 & Supp. 1987).

The court's analysis, however, does not resolve the issue. Although the Owners' exercise of their telecast copyright rights may have resulted in a violation of the Players' state law rights, this does not establish "equivalence" within the meaning of Section 301 of the Copyright Act any more than such exercise would preempt state law rights as "equivalent" if the telecast were to violate an individual's privacy rights or defame an individual. The court erred in failing to recognize that it was the Players' assertion of publicity rights in the likenesses and performances underlying the copyrighted telecasts which prevented the Owners from incorporating such likenesses and performances into the telecasts in the first instance. As *amicus* reads the record, the Players have never claimed any rights in the telecasts themselves, and hence no "right to perform an audiovisual work," contrary to the implications of the court's decision.

Indeed, in reaching its determination as to equivalence, the Seventh Circuit made no effort to analyze the elements of the copyright cause of action, on the one hand, and a right of publicity cause of action, on the other. Had it undertaken such an analysis, it simply could not have reached the conclusion it did.

II.

A Likeness or Performance Is Not A Copyrightable Work

The performance of a dramatic artist is not itself a tangible work, although others may preserve the artist's likeness and performance on film. The Seventh Circuit has nevertheless reasoned that, once embodied in a copyrightable telecast, a likeness or performance itself not only becomes copyrightable but, in fact, is subject to control by the owner of the telecast copyright.

The Seventh Circuit used the fact that game telecasts "are copyrightable works . . . because of the creative contributions of the individuals responsible for recording the Players' per-

formances," 805 F.2d at 676, to support its conclusion that the Players' likenesses and performances became copyrightable when recorded. But the court's assumption is nowhere supported by legal precedent. If the Players' likenesses and performances themselves are not independently entitled to copyright protection (which they are not, *see* M. Nimmer, *supra*, § 1.01[B][1] at 1-14.3 n.49), then their mere embodiment in a physical object entitled to such protection will not change their non-copyrightable status. It is likewise fundamental that the copyright protection afforded the owners of copyrightable telecasts extends solely to their creative contribution, and not to any of the additional or underlying elements captured by the telecasts.[6]

In the instant case, what was presumably copyrightable by the Owners was the manner in which the games and the performances taking place therein were telecast and recorded, *i.e.*, the camera angles and shot selection involved in producing the broadcast of the game. In such circumstances, the requisite "intellectual labor may be found in the production aspects of the broadcast, *e.g.*, the choice of the particular picture broadcast, and the selection of lighting and angle." Comment, *Copyright Protection for Live Sports Broadcasts: New Statutory Weapons with Constitutional Problems*, 31 Fed. Comm. L.J. 277, 285 (1979). The copyrightability of such telecast would derive not from the evanescent performances of the baseball players, but from the creative input of those who captured what is itself a non-copyrightable event. M. Nimmer, *supra*, § 1.08 [C][2] at 1-51.

The Seventh Circuit's failure to recognize these fundamental distinctions could wreak havoc in the performing arts industry. By the court's logic, anyone who happens to film the perform-

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6 This basic premise underlies the entire copyright scheme. *See, e.g.*, 17 U.S.C. § 103(b) ("The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.").

ance or an actor or other performing artist thereby can control any and all exploitations of the performance captured on film. Apart from directly contravening settled authority,[7] such a result would be plainly absurd. The performer could not, in such circumstances, turn to the copyright laws for protection. For he or she would not own a tangible work which had been "copied." The state-law remedy for such piracy—and that which today prevents it from occurring—is an action for violation of one's publicity rights. But if those rights are taken away through misapplication of copyright preemption doctrine, the value to a performing artist of his likeness and performance will stand greatly diminished. In such event, the very vitality of the performing arts will be threatened, with potentially significant adverse consequences for this nation's entertainment industry.

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7 *See, e.g., Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Republic Pictures Corp.* v. *Rogers*, 213 F.2d 662 (9th Cir.), *cert. denied*, 348 U.S. 858 (1954); *Autry* v. *Republic Productions, Inc.*, 213 F.2d 667 (9th Cir.), *cert. denied*, 348 U.S. 858 (1954).

Conclusion

Since the right of publicity is not equivalent to the protections afforded by copyright, and since the Players' likenesses and performances are not themselves copyrightable works, the provisions of Section 301(a) of the Copyright Act should not preempt the Players' exercise of their publicity rights. To protect against the destructive effects which the Seventh Circuit's ruling is likely to have upon performing artists and others, *amicus* respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

MORTIMER BECKER*
BECKER LONDON KOSSOW
& JAFFE
30 Lincoln Plaza
New York, New York 10023
(212) 541-7070

**Counsel of Record*
for Amicus Curiae

JEROME LURIE
COHN, GLICKSTEIN
& LURIE
Of Counsel

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MOTION FOR LEAVE TO FILE BRIEF, *AMICI CURIAE*, AND BRIEF OF THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, NATIONAL BASKETBALL PLAYERS ASSOCIATION, NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION AND MAJOR INDOOR SOCCER LEAGUE PLAYERS ASSOCIATION, AS *AMICI CURIAE*

LAWRENCE I. FOX
BERGER & STEINGUT
600 Madison Avenue
New York, New York 10022
(212) 980-1400

Attorney for Amici Curiae

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MOTION OF THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, NATIONAL BASKETBALL PLAYERS ASSOCIATION, NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION AND MAJOR INDOOR SOCCER LEAGUE PLAYERS ASSOCIATION, FOR LEAVE TO FILE BRIEF, AS *AMICI CURIAE*

The National Football League Players Association ("NFLPA"), National Basketball Players Association ("NBPA"), National Hockey League Players Association ("NHLPA") and Major Indoor Soccer League Players Association ("MISLPA") hereby seek leave of this Court to file a brief as *amici curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of the petition of the Major League Baseball Players Association ("MLBPA"), Stephen D. Rogers, Steven Renko, Jr., and Robert R. Boone (collectively referred to herein as the "Players") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on October 29, 1986.* This motion is necessitated by the refusal of counsel for respondents, The Commissioner of Major League Baseball, The National League of Professional Baseball Clubs, The American League of Professional Baseball Clubs, the Major League Baseball Promotion Corporation and the Major League Baseball Owners (collectively, the "Owners" or the "Clubs") to grant permission to file such *amicus* brief. The brief of the NFLPA, NBPA, NHLPA and MISLPA (collectively "*amici*"), conditionally filed herewith, is annexed to this motion.

Interest of the *Amici*

The NFLPA, NBPA, NHLPA and MISLPA are all labor organizations that collectively represent the interests of thousands of professional athletes, with each organization representing professional athletes in a particular sport. The representation provided by *amici* to their individual members includes such matters as contract negotiations with the owners of the teams on which their members play and the management of pension funds.

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* The opinion of the court of appeals is reported at 805 F.2d 663 (7th Cir. 1986) and appears as Appendix A to the Players' petition.

Amici all have a duty to promote the welfare of their members by, among other things, assuring the continued vitality of various legal rights held by their members. In the instant case, *amici* have a substantial interest in ensuring that the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* ("the Act" or "the Copyright Act"), is not given an overbroad judicial interpretation which would result in the preemption of their members' state-created publicity rights.

The opinion below expands the reach of the copyright law beyond all prior bounds. Its conclusion that athletes' likenesses and performances are "works" entitled to copyright protection is without precedent; its bootstrapping from that conclusion to the further conclusion that such "works" come under the control of owners of professional sports teams as "works for hire" by virtue of those owners' control of copyrighted game telecasts seriously compounds its error.

It is well settled that the game performances of professional athletes are not copyrightable works of authorship under the Copyright Act. The Seventh Circuit's contrary holding distorts the Copyright Act beyond recognition and destroys carefully-developed state-law protections traditionally afforded to athletes and others.

The annexed *amicus* brief discusses in greater detail why the court of appeals' analysis not only runs roughshod over the plainly-defined limits of the Copyright Act, but in the process threatens the vitality of important individual rights traditionally protected by state law. It also discusses how the court's holding, if not corrected, will adversely affect *amici's* member athletes.

It is therefore respectfully requested that *amici's* motion for leave to file the annexed brief be granted.

Respectfully submitted,

/s/ Lawrence I. Fox
LAWRENCE I. FOX

BERGER & STEINGUT
600 Madison Avenue
New York, New York 10022
(212) 980-1400

Attorney for Amici Curiae

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—v.—

BALTIMORE ORIOLES, INC., ET AL.,

Respondents.

STEPHEN D. ROGERS, ET AL.,

Petitioners,

—v.—

BOWIE K. KUHN, ET AL.,

Respondents.

IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, NATIONAL BASKETBALL PLAYERS ASSOCIATION, NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION AND MAJOR INDOOR SOCCER LEAGUE PLAYERS ASSOCIATION, AS *AMICI CURIAE*

Preliminary Statement

The National Football League Players Association, National Basketball Players Association, National Hockey League Players Association and Major Indoor Soccer League Players Association ("*amici*") submit this brief, *amici curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of Petitioners, the Major League Baseball Players Association, Stephen D. Rogers, Steven Renko, Jr., and Robert R. Boone (collectively referred to herein as the "Players").

Interest of the *Amici*

The interest of the *amici curiae* is set forth in the preceding motion papers.

Argument

THE GAME PERFORMANCES OF ATHLETES ARE NOT WORKS FOR HIRE THAT HAVE BEEN CREATED BY SUCH PROFESSIONAL ATHLETES FOR THE BENEFIT OF THE OWNERS; IN CONCLUDING OTHERWISE, THE COURT OF APPEALS FUNDAMENTALLY MISCONSTRUED THE COPYRIGHT ACT AND GAVE SHORT SHRIFT TO CO-EXISTING STATE-LAW INTERESTS WARRANTING PRESERVATION

When a professional athlete takes the field, he performs in a game. It is his athletic ability that gives rise to his status as a professional; that same ability gives value to the rights conferred by state law upon athletes, as upon other individuals, to exploit commercially their likenesses and performances. The labor agreements governing *amici's* members' contractual relationships with the teams for which they play carefully preserve these state-conferred publicity rights. They are a matter of considerable commercial value and, without doubt, the finan-

cial terms arrived at between individual teams and individual athletes reflect that value.

Never, prior to the instant suit, has the marketing of these athletic abilities been said to be subject to regulation under copyright law doctrine, rather than under state law and at the bargaining table. Yet, by aberrantly construing such athletic performances as "works of authorship" within the meaning of the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* ("the Act" or "the Copyright Act"), and further concluding that such "works" become "works for hire" within the meaning of the Act—controlled by the team owners by virtue of their ownership of the game telecasts—the Seventh Circuit has eradicated a body of critical legal protections for professional athletes and conferred upon the owners of the telecasts rights which the Copyright Act never contemplated they would have. The ramifications of the Seventh Circuit's reasoning are far-reaching. They extend far beyond the instant dispute and affect all professional athletes, as well as other entertainers and public personalities.

A. Game Performances Are Not Copyrightable Works

The fundamental legal question raised by the instant case is whether athletes' likenesses and performances constitute copyrightable works such that, under Section 301 of the Copyright Act,[1] the state-created publicity rights in these likenesses and performances are subject to preemption.[2] *Amici* had thought

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1 Section 301(a) of the Act provides in relevant part:

> [A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a).

2 Courts have long recognized that athletes own viable rights of publicity in their likenesses and performances. *See, e.g., Fleer Corp.* v.

the law on this point was clear—that such likenesses and performances are *not* "works of authorship [which] come within the subject matter of copyright," as is required for preemption to occur pursuant to Section 301. This conclusion follows from the very fabric of the federal copyright scheme, which is confined to affording protection to individual efforts reflecting "creative intellectual or aesthetic labor." *Goldstein* v. *California*, 412 U.S. 546, 561 (1973); M. Nimmer, *Nimmer on Copyright* § 1.08[C] at 1-48 to -49 (1986).[3] This prerequisite for copyright protection—confirmed by examination of the qualifying categories of "works of authorship" set forth in Section 102(a) of the Act[4]—makes self-evident the conclusion that the likenesses and performances of the Players do not constitute examples of authorship of the type sought to be protected by

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Topps Chewing Gum, Inc., 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982); *Ettore* v. *Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); *Haelan Laboratories, Inc.* v. *Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

3 This is consistent with the Constitution's limited authorization to the Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

4 Pursuant to Section 102(a) of the Act:

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
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> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works; and
> (7) sound recordings.

17 U.S.C. § 102(a).

the copyright law and hence do not qualify as copyrightable works.

The copyright law's requirement of "creative intellectual or aesthetic labor" is clearly not met by the evanescent performance of an athlete in a sporting event—whether it is Dwight Gooden firing a fastball, Earvin "Magic" Johnson driving to the basket for a layup, or Walter Payton running off tackle for a touchdown. The performance of an athlete, highly skilled as it is, simply is not "creative," "intellectual" or "aesthetic" in the sense that books, musical scores, paintings or motion pictures are. The same is true for the athletes' likenesses: their physical appearances result from accident of birth, not bursts of artistic energy protected by copyright.

The dispositive distinction between copyrightable expression and a non-copyrightable likeness or performance has long been recognized. As Professor Nimmer has cogently pointed out,

> Apart from whether or not the publicity right is "equivalent," it would seem that preemption is conclusively foreclosed by the failure of the "work" to fall within the subject matter of copyright. The "work" which is the subject of the right of publicity is the name and likeness of a celebrity. This can hardly be said to constitute a "writing" of an "author" within the meaning of the Copyright Clause of the Constitution. A fortiori it is not a "work of authorship" under the Act.

M. Nimmer, *supra*, § 1.01[B][1] at 1-14.3 n.49 (citations omitted).

The Seventh Circuit in this case never really came to grips with this dispositive notion. It sidestepped the core question and instead focused upon whether the Players' likenesses and performances were "fixed in a tangible medium of expression"—an *additional* (but not alternative) requirement prescribed by Section 102 of the Act as a prerequisite to qualification as a "work of authorship."

The Seventh Circuit found the fixation requirement to be satisfied by virtue of the fact that the Players' performances were embodied in videotaped game telecasts. 805 F.2d at 674-75. In concluding that the Players' likenesses and performances were thereby transformed into copyrightable works of authorship, the court of appeals ignored another basic tenet of copyright law—that the mere fixation of an uncopyrightable event does not transform such event into a protectable work of authorship. As Professor Nimmer again advises:

> [I]f a work which itself is not a writing (e.g., an athletic event, a parade, etc.) is broadcast or otherwise disseminated in a written form (e.g., motion picture film) then such writing itself may claim copyright protection. *The copyright in such case lies in the manner of photographing or otherwise recording the event, although not in the event itself.*

M. Nimmer, *supra*, § 1.08[C][2] at 1-51 (emphasis added).

The court of appeals' analysis, while facile, was plainly incorrect. Satisfied that the game telecasts "are copyrightable works . . . because of the creative contributions of the individuals responsible for recording the Players' performances," 805 F.2d at 676, the court backed into the conclusion that, since the performances were the subject matter of the telecasts, rights in the game performances were subsumed by the telecast copyrights. In weaving these plainly separable concepts into a seamless copyright web, the Seventh Circuit misconstrued basic copyright precepts, and expanded the scope of the Copyright Act beyond any boundaries conceivably intended by Congress.[5] The full dangers of its erroneous reasoning became

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5 The pertinent distinction here, between the potentially copyrightable *telecast* of a baseball game and the non-copyrightable *event* (the game itself and the Players' likenesses and performances contained therein), has been recognized in principle by this Court. In *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239 (1903), the Court confronted the issue of whether chromolithographs depicting groups of circus performers were copyrightable works. In noting the "originality" involved in the creation of the drawing, and thus holding it copyrightable, Justice Holmes contrasted the copyright status of such a rendering

apparent by the conclusions it next drew, from its analysis, as to who "owned" these likenesses and performances.

B. The Game Performances of Professional Athletes Are Not Works for Hire under the Copyright Act

The Copyright Act makes provision for the circumstance where an employee, "within the scope of his or her employment," 17 U.S.C. § 101, creates a work of authorship. In such a circumstance, absent agreement of the parties to the contrary, the employer is considered to be the "author" of the work, and thereby is entitled to ownership of the copyright. 17 U.S.C. § 201(b). The Seventh Circuit, again illustrating its confusion over basic copyright principles, and compounding its earlier error, concluded that the Owners held "work for hire" copyrights in telecasts of baseball games, and that such copyrights encompassed the likenesses and performances of the Players.

But it is fundamental that for there to be a "work for hire," there must be a "work" which is itself entitled to copyright protection. The Players' likenesses and performances, themselves not constituting copyrightable works, simply cannot be transformed into works for hire. The court of appeals failed to grasp this all-important concept, instead reaching its "work for hire" result by in essence holding that the efforts of the technical crew in filming the games enabled the Owners to obtain "work for hire" copyrights in the telecasts. But whether or not the *telecasts* are properly works for hire—*i.e.*, whether the owners stand in the technical crews' shoes with respect to obtaining the copyrights in the telecasts of the games—is of

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with the "actual groups—visible things" portrayed. As the Court stated: "Others are free to copy the original [*i.e.*, the circus performers]. They are not free to copy the copy [*i.e.*, the chromolithographs of the performers]." *Id.* at 249.

Similar reasoning is found in *Time Inc.* v. *Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968), where the court distinguished between the non-copyrightability of the information or event recorded in the Zapruder film of the Kennedy assassination and the copyrightable nature of the film itself.

little consequence here. The fatal flaw in the Seventh Circuit's reasoning was in making the logical leap that ownership of the telecasts, whether under a "work for hire" theory or otherwise, stripped the Players of their publicity rights. The court of appeals again misapplied copyright law principles in concluding that the Players' publicity rights are subject to "work for hire" arrogation by the Owners.[6]

C. The Seventh Circuit's Ruling Threatens to Impair Important State-Created Rights Subject to Exercise by Professional Athletes Independent of the Copyright Laws

Unless overturned, the decision at issue will negatively affect not only professional baseball players, but all professional athletes. Professional athletes' skills, as reflected in their game performances, are a critically important personal asset. The unauthorized exploitation of this asset is guarded against by the publicity law doctrines of the various states. When professional athletes bargain over the terms of their employment, they endeavor to define the extent to which these publicity rights are being consensually granted to the teams for which they perform. Their compensation for services reflects these understandings. Beyond their game performances, professional athletes control important publicity rights in their names and likenesses which are frequently exploited, *e.g.*, in product endorsements and other advertisements.

The Seventh Circuit's decision, by holding that the team owners' copyrights in televised games preempt the Players' ability to exercise their rights of publicity, threatens to undermine professional athletes' carefully-developed, long-protected and valuable assets in their names, likenesses and performances. If a team owner, simply by virtue of controlling the copyright in a televised sporting event, is entitled freely to exploit the performances captured in that telecast, why bargain over them? Why listen to the athletes' contentions that exploi-

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6 The Players' *Petition for a Writ of Certiorari* discusses in detail the erroneous application of Section 301 of the Copyright Act to preempt the Players' publicity rights. That discussion will not be repeated here.

tations of the performances on new media, such as cable television, require consent? What in the logic of the Seventh Circuit would, moreover, prevent an Owner from selling to a third party the rights to use a particular copyrighted performance in unrelated commercial contexts? Does the premise of the Copyright Act—that solely the copyright owner can make copies of the copyrighted work—mean that athletic performances that have been captured on videotape cannot be duplicated by that athlete without permission of the owner of the videotape? Would a professional skater, for example, be subject to being prohibited from performing her skating program having once had it memorialized on film or videotape?

These are but a few of the basic concerns raised by the Seventh Circuit's ruling. Its potential for disruption of the professional lives of thousands of athletes is immense. The lack of legal foundation for the ruling, as well as its potentially broad, adverse consequences for professional athletes and others, warrants review by this Court.

Conclusion

To correct the fundamental errors committed by the court of appeals, this Court should grant the Players' *Petition for a Writ of Certiorari.*

Respectfully submitted,

LAWRENCE I. FOX
BERGER & STEINGUT
600 Madison Avenue
New York, New York 10022
(212) 980-1400

Attorney for Amici Curiae

FEBRUARY 1987